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The Use Of Restraint And Seclusion On Disabled Students Is A Violation Of Their Procedural And Sustantive Due Process Rights

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Abstract

In public and private schools, disabled children are being restrained and secluded against their will.¹ One Florida disabled student was restrained in a hot dog roll, which is when teachers roll the student up in blankets

KEYWORDS: rehabilitation, rights, disabilities

THE USE OF RESTRAINT AND SECLUSION ON DISABLED STUDENTS IS A VIOLATION OF THEIR PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS

JENNIFER NOUD*

I.	INTRODUCTION.....	266
II.	FEDERAL STATUTES REGARDING DISABLED CHILDREN	268
A.	<i>The Americans with Disabilities Act</i>	268
B.	<i>Section 504 of the Rehabilitation Act of 1973</i>	269
C.	<i>Title II of the ADA of 1990</i>	269
D.	<i>History of the Protection and Advocacy System and the National Disability Rights Network</i>	270
E.	<i>History of the Individuals with Disabilities Education Act</i>	271
F.	<i>Guidelines from U. S. Secretary of Education Arne Duncan</i>	274
III.	THERE IS NO FEDERAL STATUTE THAT ADDRESSES RESTRAINT OR SECLUSION OF DISABLED CHILDREN IN SCHOOLS.....	276
IV.	FLORIDA RESTRAINT AND SECLUSION LAWS	277
A.	<i>Child with a Disability Definition</i>	279
B.	<i>Florida Restraint Regulations</i>	279
C.	<i>Florida Seclusion Regulations</i>	282
D.	<i>Florida Statutes and Regulations That Are Supposed to Protect Students from Restraint and Seclusion</i>	284
1.	Florida’s Monitoring and Reporting Systems.....	286
2.	Documentation Requirement	289
V.	CORPORAL PUNISHMENT IN SCHOOLS VIOLATES DISABLED STUDENTS’ CONSTITUTIONAL RIGHTS TO BE FREE FROM EXCESSIVE CORPORAL PUNISHMENT AND DISCRIMINATED AGAINST SOLELY DUE TO THEIR DISABILITIES	292

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A.	<i>Procedural Due Process</i>	292
B.	<i>Substantive Due Process Rights</i>	298
C.	<i>The Rowley Court Set the Legal Test to Determine if a Child Has a FAPE in School</i>	311
D.	<i>Disabled Children and Their Parents Suing Schools Under the Federal Statute IDEA Does Not Provide the Protection Most Disabled Students Sought for in the Federal Court System</i>	314
VI.	RECOMMENDATIONS	314
VII.	CONCLUSION	317

I. INTRODUCTION

In public and private schools, disabled children are being restrained and secluded against their will.¹ One Florida disabled student was restrained in a hot dog roll, which is when teachers roll the student up in blankets.² After the school admitted the teachers had rolled the child up for fun, the parents then realized their child had odd reactions to blankets and towels at home.³ Another autistic student, who weighs only fifty-two pounds and is in second grade, was restrained and pinned down to the floor repeatedly.⁴ His mother said the teachers “bust[ed] his lip, bruise[d] his torso and arm, and sprain[ed] his neck on different occasions.”⁵ When the mother found the bruises, she filed a no-restraint letter with the school, but despite this, the abuse continued.⁶ Additionally, another disabled student—who was crying—was restrained in a chair at a public school by a teacher using packing tape.⁷ The twenty-one year old teacher taped the five-year-old disabled student to a chair so tightly that he could not move, and then turned the chair upside down.⁸ The teacher said he did this as a form of discipline, and would not release the student until he stopped crying.⁹ On another

1. See *infra* Part II.

2. *Parent Story: Who Will Care About Our Children Once EducRAT\$ Cleanse*, NAT’L ASS’N FOR PREVENTION OF TEACHER ABUSE, <http://endteacherabuse.org/Musumeci.html> (last visited Aug. 27, 2015).

3. *Id.*

4. *Technique Leaves Second-Grader with Bruises, Sprain, Busted Lip* Isaiah Moore, PALM BEACH POST, Oct. 10, 2010, at A8.

5. *Id.*

6. *Id.*

7. *Man Charged with Abuse After Taping Student into Chair Police Say Boy, 5, Unhurt, Suffered ‘Mental Anguish’*, SUN SENTINEL, Mar. 9, 2011, at B2.

8. *Id.*

9. *Id.*

occasion, another student put the same child into a trashcan, and the teacher pushed him down so he could not get out of the trashcan.¹⁰ This teacher was arrested for aggravated child abuse.¹¹ Another abuse incident transpired when an aide broke a disabled student's arm at an elementary school.¹² The school fired the special education aide, who was also a behavioral specialist, for using inappropriate discipline but was not arrested on criminal charges.¹³ This is what occurs daily in our Florida public schools.¹⁴ Florida and federal statutes do not prohibit the restraining and secluding of disabled students.¹⁵ Florida and federal statutes ought to limit restraining and secluding disabled students to emergency purposes only.¹⁶

This Comment analyzes the problems with the current Florida laws on restraining and secluding disabled children in school.¹⁷ Part II explains the historical aspects of federal statutes regarding disabled children from 1973 until the present.¹⁸ Part III examines the history of all past and current federal statutes that have been proposed in both the U.S. House of Representatives and the U.S. Senate from 2009 through 2015.¹⁹ None of these bills have been enacted yet.²⁰ Part IV surveys Florida statutes and regulations concerning disabled students, when school personnel are allowed to restrain or seclude them and how the school personnel are supposed to document and record the incidents.²¹ Part V scrutinizes how schools violate disabled students' Fourteenth Amendment rights by inflicting corporal punishment on them.²² Part V also analyzes disabled students' procedural due process rights and their substantive due process rights.²³ Part VI provides recommendations on how to prevent school personnel from restraining and secluding disabled students in school improperly and to only restrain or seclude students if they are an imminent threat to themselves or others around them.²⁴

10. *Id.*

11. *Id.*

12. NAT'L ASS'N FOR PREVENTION OF TEACHER ABUSE, *supra* note 2.

13. *Id.*

14. *See infra* Part IV.

15. *See infra* Parts III–IV.

16. *See infra* Part VI.

17. *See infra* Parts III–IV.

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part III.

21. *See infra* Part IV.

22. *See infra* Part V.

23. *See infra* Part V.

24. *See infra* Part VI.

II. FEDERAL STATUTES REGARDING DISABLED CHILDREN

A. *The Americans with Disabilities Act*

The Americans with Disabilities Act (“ADA”) was passed in 1990 to protect the civil rights of individuals with disabilities.²⁵ Title II of the ADA specifically prohibits discrimination of individuals with disabilities.²⁶ The school district falls under Title II Chapter 2.8000 of the ADA as a public service.²⁷ Congress had to clarify what it intended when it passed the ADA in 2008.²⁸ In September of 2008, President Barack Obama signed into law the Americans with Disabilities Act Amendments Act of 2008 (“ADA AA”).²⁹ This law came into effect on January 1, 2009.³⁰ Congress passed the ADA AA because the Supreme Court of the United States’ decisions interpreted the ADA’s definition of a disability too narrowly.³¹ Congress explained that the ADA AA rejects the high burden from the Supreme Court and reiterates Congress’ intent for the scope of the ADA to be broad and inclusive, not narrow.³² Congress specified that “[i]t is the intent of the legislation to establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress

25. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b) (2012); NAT’L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: THE U.S. DEPARTMENT OF EDUCATION MUST DO MORE TO PROTECT SCHOOL CHILDREN FROM RESTRAINT AND SECLUSION 41 (2012), available at www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf.

26. 42 U.S.C. § 12132; *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. DEP’T OF EDUC. OFFICE FOR CIV. RTS., (Jan. 19, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html> (last modified Jan. 19, 2012).

27. Dep’t of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services*, <http://www.ada.gov/taman2.html> (last visited Sep. 2, 2015); *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, U.S. DEP’T OF EDUC. OFFICE FOR CIV. RTS. (Dec. 19, 2013), <http://www2.ed.gov/about/offices/list/ocr/504faq.html> (last modified Dec. 19, 2013).

28. *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, *supra* note 26.

29. *Id.*; see also ADA Amendments Act of 2008, Pub. L. No. 110-325, § 1, 122 Stat. 3553, 3553 (2008) (codified as amended at 42 U.S.C. § 12101–12201 (2012)).

30. § 8, 122 Stat. at 3559.

31. *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, *supra* note 26; see also § 2, 122 Stat. at 3553.

32. *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, *supra* note 26; see also § 2, 122 Stat. at 3554.

originally intended.”³³ In this amendment, it also broadens the scope of major life activities, and provides a non-exhaustive list of both general activities and bodily functions.³⁴

B. *Section 504 of the Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973 (“Section 504”)—now 29 U.S.C. § 794—prohibits any program that receives federal financial assistance to deny a qualified handicapped person benefits, exclude participation, or be subjected to discrimination solely due to the person’s handicap.³⁵ The ADA AA affects the Rehabilitation Act of 1973 by changing what it means to have a disability.³⁶ This amendment now broadens the scope of a disability, and students who were denied before based on the narrow definition of disability, might now be able to qualify under the broader definition.³⁷ Section 504 requires that a free appropriate public education (“FAPE”) be provided to all students that qualify with a disability.³⁸

C. *Title II of the ADA of 1990*

Title II of the ADA of 1990 prohibits discrimination due to a person’s disability.³⁹ Title II cannot be construed to any lesser standard other than the standards under Section 504 and its implementing regulations.⁴⁰ Title II prohibits discrimination by all state and local government services,

33. *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, *supra* note 26.

34. § 3, 122 Stat. at 3555; *see also* 34 C.F.R. 104.3(j)(2)(ii)–(iii) (2013); *Disability Discrimination*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/rights/guid/ocr/disability.html> (last modified Sept. 21, 2012).

35. 29 U.S.C. § 794 (2012); 34 C.F.R. § 104.1, .4; *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, *supra* note 27.

36. *Disability Discrimination*, *supra* note 34; *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, *supra* note 27; *see also* § 3, 122 Stat. 3555.

37. *See* § 3, 122 Stat. at 3555; *Disability Discrimination*, *supra* note 34.

38. *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 27; *see also* 29 U.S.C. § 794.

39. Americans with Disabilities Act of 1990, 42 U.S.C. § 12132; Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, to Colleague 2 (May 14, 2014), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>.

40. *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, *supra* note 26; *see also* 29 U.S.C. § 794; 42 U.S.C. § 12132.

programs, and activities—which include public schools—regardless of whether the state or local government service receives any federal financial assistance.⁴¹

D. *History of the Protection and Advocacy System and the National Disability Rights Network*

The federally mandated Protection and Advocacy System (“P&A”) program is located in every state in the country.⁴² The P&A program provides support for people with mental, emotional, intellectual, and physical disabilities.⁴³ The National Disability Rights Network (“NDRN”) is a nonprofit organization for P&A, which allows NDRN to try and make a society that gives disabled individuals equal opportunities, where they can exert their meaningful choices and their autonomy.⁴⁴ Through legal assistance, legislative advocacy, and training assistance, NDRN hopes to create a better society for disabled individuals.⁴⁵ However, while these programs are all in place to help disabled individuals, the Office of Special Education Programs (“OSEP”) is directly accountable for administering the implementation of special education laws.⁴⁶

NDRN published its first report in 2009 on restraint and seclusion in schools and found that, notwithstanding twenty years of allegations of abuse, nineteen states had no laws on restraint and seclusion to protect children in school.⁴⁷ Florida was one of the states that did not have any laws on restraint

41. *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 27; *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, *supra* note 26; *see also* 42 U.S.C. § 12132.

42. NAT’L DISABILITY RIGHTS NETWORK, *supra* note 25, at 42.

43. *Id.* at 42–43.

44. *Id.*

45. *Id.*

46. *Id.*

47. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 4–5 (2009) [hereinafter U.S. GOV’T ACCOUNTABILITY OFFICE]; Darcie Ahern Mulay, *Keeping All Students Safe: The Need for Federal Standards to Protect Children from Abusive Restraint and Seclusion in Schools*, 42 STETSON L. REV. 325, 327 n.12 (2012) (finding that the other remaining states that do have laws on restraining and secluding children are very limited and ineffective for its purpose). *But see* JESSICA BUTLER, THE AUTISM NAT’L COMM., HOW SAFE IS THE SCHOOLHOUSE?: AN ANALYSIS OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES 57–58 (2015), *available at* <http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf> (documenting that of the laws that go into effect on March 18, 2015, seventeen states—including Arizona, Delaware, Florida, Idaho, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, North Dakota,

and seclusion in schools in 2009.⁴⁸ The Government Accountability Office (“GAO”) then reported that restraint and seclusion laws vary from state-to-state and are very broad in their interpretation.⁴⁹ The Individuals with Disabilities Education Act (“IDEA”) requires that students aged three to twenty-one receive education in the least restrictive environment.⁵⁰

E. *History of the Individuals with Disabilities Education Act*

On November 29, 1975, President Gerald Ford signed the Education for All Handicapped Children Act (“EHA”)—also known as Public Law 94-142—into law.⁵¹ The EHA was passed to help disabled children attend school and to not be discriminated against while in school.⁵² Before the EHA passed in 1970, schools in the United States only educated one in five children who had disabilities.⁵³ During this time, most states had laws excluding students who were deaf, blind, emotionally disturbed, or mentally retarded.⁵⁴ The EHA was amended in 1990, and is now called IDEA.⁵⁵ IDEA was passed to specifically protect children with disabilities.⁵⁶

There are landmark cases furthering educational support for disabled students.⁵⁷ Cases like *Pennsylvania Ass’n for Retarded Children v. Pennsylvania*⁵⁸ and *Mills v. Board of Education of the District of Columbia*⁵⁹ recognized that states and local neighborhoods have the

Pennsylvania, South Dakota, Tennessee, Utah, Virginia, and Wyoming—do not have a specific statute, regulation, or guideline on secluding and restraining children in schools).

48. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 47, at 4 n.4.

49. *Id.* at 4.

50. 20 U.S.C. § 1412(a)(1)(A), (5)(A) (2012); U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 47, at 3.

51. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (amended 1990); *The Office of Special Education and Rehabilitative Services Celebrates 35 Years of the Individuals with Disabilities Education Act (IDEA)*, OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., <http://www2.ed.gov/about/offices/list/osers/idea35/index.html> (last modified June 6, 2012).

52. *History: Twenty-five Years of Progress in Educating Children with Disabilities through IDEA*, OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., <http://www2.ed.gov/policy/speced/leg/idea/history.pdf> (last modified July 19, 2007).

53. *Id.*

54. *Id.*

55. 20 U.S.C. § 1400.

56. *History: Twenty-five Years of Progress in Educating Children with Disabilities through IDEA*, *supra* note 52.

57. *Id.*

58. 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam).

59. 348 F. Supp. 866 (D. D.C. 1972).

responsibility to educate children with disabilities.⁶⁰ In *Mills*, the court held that children with disabilities have the right to be educated because the right to an education is protected by the equal protection clause of the Fourteenth Amendment to the U. S. Constitution.⁶¹

The United States has made progress to better accommodate disabled children's basic needs.⁶² Nevertheless, even though disabled students were being accommodated, they were accommodated not so they could go to school, but so they could go to state institutions.⁶³ At these state-run institutions, they were provided with minimal food, shelter, and clothes, which is not in itself very accommodating.⁶⁴ The United States finally started making programs for the disabled students and their families.⁶⁵ Through IDEA, children with disabilities now receive FAPE in every state in the United States, which is provided by OSERS.⁶⁶ IDEA and FAPE were a response to the millions of disabled students who were either excluded from being educated, or had limited access to education.⁶⁷

Now disabled children are able to attend schools, become educated, and become productive members of society, instead of being in state institutions.⁶⁸ With the implementation of IDEA and FAPE, disabled students are now attending high school graduation, going to college, and finding employment.⁶⁹ These implementations are moving this country in the right direction; however, there is still more work to be done.⁷⁰ What these federal laws have tried to implement is a safeguard for disabled

60. *Id.* at 878; *Pa. Ass'n for Retarded Children*, 334 F. Supp. at 1259–60; *History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 52.

61. *Mills*, 348 F. Supp. at 868, 875; *see also History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 52.

62. *See Mills*, 348 F. Supp. at 878; *History: Twenty-five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 52.

63. *See History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 52.

64. *Id.*

65. *Id.*

66. *The Office of Special Education and Rehabilitative Services Celebrates 35 Years of the Individuals with Disabilities Education Act (IDEA)*, *supra* note 51.

67. *History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 52; *see also* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(b)(9), (c), 89 Stat. 773, 775 (amended 1990).

68. *History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 51; *see also* Education for All Handicapped Children Act of 1975, § 3(b)(9), (c), 89 Stat. at 775.

69. *See History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 52.

70. *See id.*

children to attend school and be accommodated.⁷¹ With these laws also came federal training assistance for special education teachers and related specialists.⁷² However, all of this training for special education teachers and related specialists fell short because there are hundreds of cases of disabled students being restrained and secluded in Florida schools.⁷³ When these disabled children are restrained and secluded against their will, although they sometimes may not be hurt physically, they are hurt mentally and emotionally.⁷⁴ Some cases have been reported of disabled children who were restrained or secluded, and as a consequence, were physically injured, and in rare cases some children have even died.⁷⁵

IDEA authorizes the federal government to give funds to states for educating disabled children as long as the state complies with the provisions of IDEA.⁷⁶ All disabled students are located and evaluated to establish if the child is eligible for special education and related services that the state offers.⁷⁷ If a child is accepted for special education, the child's parents and school personnel develop an Individualized Education Program ("IEP").⁷⁸ An IEP is a document that explains the goals of the student and what services are to be provided to the student.⁷⁹ The IEP was created to give the student goals, cater to the student's unique needs, and provide services throughout the student's education in order to improve their learning capabilities while

71. See Education for All Handicapped Children Act of 1975, § 3(c), 89 Stat. at 775; *History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 52.

72. *History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, *supra* note 52. Acts were enacted to expand training of teachers in all disability areas. Teachers of the Deaf Act of 1963, Pub. L. No. 88-164, 77 Stat. 282; Captioned Films Act of 1961; Teachers of the Deaf Act of 1961, Pub. L. No. 87-276, 75 stat. 575 (which trained teachers for deaf students); The Training of Professional Personnel Act of 1959, Pub. L. No. 86-158, 73 stat. 339 (trained teachers on how to teach mentally retarded students); Captioned Films Act of 1958, Pub. L. No. 85-905, 72 Stat. 1742 (trained teachers for students who had mental retardation).

73. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 7-8.

74. *Id.* at 8.

75. *Id.*

76. NANCY LEE JONES & CAROL J. TOLAND, CONG. RESEARCH SERV., R40521, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): SELECTED JUDICIAL DEVELOPMENTS FOLLOWING THE 2004 REAUTHORIZATION 1 (2009).

77. *Id.*

78. 20 U.S.C. § 1414(d)(1)(A)(i) (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 3.

79. 20 U.S.C. § 1414(d)(3)(A); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 3.

in school.⁸⁰ With the 2004 reauthorization of IDEA, Congress required the U.S. Department of Education to create model forms for IEP, prior written notice, and procedural safeguards.⁸¹

F. *Guidelines from U. S. Secretary of Education Arne Duncan*

On July 31, 2009, U. S. Secretary of Education Arne Duncan sent a letter to all Chief State School Officers and advised each state to review its current policies on restraint and seclusion.⁸² In Mr. Duncan's letter, he advised the Chief State School Officers of a technique that is available called positive behavior interventions and support ("PBIS").⁸³ He urged schools to apply the PBIS technique to all students, staff, and all places in school so that eventually restraining and secluding any child would be unnecessary.⁸⁴ He also urged schools to start reporting incidents where students were restrained or secluded.⁸⁵ Mr. Duncan wanted these reports to be published so other students, administrators, teachers, and parents of children can consent to the procedures and techniques used at a particular school.⁸⁶ Furthermore, in 2009, the U.S. Department of Education "asked its regional Comprehensive Centers to collect [every] [s]tate's statutes, regulations, policies, and guidelines [relating to] the use of restraint and seclusion" in school.⁸⁷ This information was then posted on the U.S. Department of Education's website.⁸⁸ Additionally, the Substance Abuse and Mental Health Services Administration ("SAMHSA")—which is affiliated with the U.S. Department of Health and Human Services—asked the OSEP to look at a paper written by SAMHSA concerning abusive restraints and seclusions in school.⁸⁹ The OSEP concluded, after reading the report, that it would benefit everyone at school, but especially students "if information and technical assistance were provided to [s]tate departments of education, local school districts, and preschool, elementary, and secondary schools" to help reduce restraint and

80. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 3; DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAWS 15 (2009), available at <http://www.ada.gov/cguide.pdf>.

81. OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., GUIDANCE ON REQUIRED CONTENT OF FORMS UNDER PART B OF THE IDEA 1 (2009).

82. U.S. DEP'T OF EDUC., RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 4-5 (2012).

83. *Id.* at iii, 5, 25.

84. *Id.* at iii.

85. *See id.* at 5.

86. *Id.*

87. U.S. DEP'T OF EDUC., *supra* note 82, at 5.

88. *Id.*

89. *Id.*

seclusion.⁹⁰ The information and technical assistance provided to the schools, instruct schools to use restraint or seclusion only when a student is an immediate, serious, physical danger to himself or others.⁹¹

In the GAO report documenting instances of abuse from 1990–2009, most of the instances where children were restrained or secluded were due to “problems with untrained or poorly trained staff.”⁹² The GAO report presented four encompassing themes: (1) disabled children were restrained and secluded when there was no physically aggressive trigger and when their parents did not give consent for those techniques to be used; (2) a disabled child restrained face-down or a restraint that blocks the airway so no air can get to the lungs can make the child die; (3) school personnel were not trained on how to properly restrain and seclude disabled children; and (4) school personnel that were not properly trained on how to restrain and seclude children and have seriously injured or killed them, are still employed as teachers.⁹³

On May 19, 2009, “[t]he GAO report was presented to the U.S. House of Representatives’ Committee on Education and Labor [during] a hearing [regarding] restraint and seclusion.”⁹⁴ During this hearing and other hearings on the same issue, other testimony was also presented, such as disabled students who were abused by being restrained or secluded in school.⁹⁵ This led to the drafting of the first federal legislation to protect students from being restrained or secluded in school.⁹⁶

The U.S. Department of Education recognizes that all districts and all states can surpass the fifteen principles framework, but all states are going to be urged strongly to follow these fifteen principles.⁹⁷ It gives guidelines as to when to use restraint and seclusion, how teachers should be trained, school policies on restraint and seclusion, and documenting restraint and seclusion incidents.⁹⁸ The fifteen principles exemplify how to reduce or eliminate restraint and seclusion school wide.⁹⁹ These fifteen principles offer schools appropriate behavior guideline, not only to develop policies on

90. *Id.*

91. *Id.*

92. U.S. DEP’T OF EDUC., *supra* note 82, at 7.

93. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 47, at 7.

94. U.S. DEP’T OF EDUC., *supra* note 82, at 7.

95. *Id.*

96. *See id.* at 7–8.

97. *Id.* at 11–12.

98. *See id.* at 12–13.

99. Press Release, U.S. Department of Education, U.S. Department of Education Issues Resource Document that Discourages Restraint and Seclusion (May 15, 2012), <http://www.ed.gov/news/press-releases/us-department-education-issues-resource-document-discourages-restraint-and-seclusion>.

their heads to the blackboard, and taped the chairs they sat in to the blackboard.¹¹⁶ These children were only six years old.¹¹⁷ The teacher's assistant was arrested eight times for various felonies, and the school stated it did not allow corporal punishment.¹¹⁸ Many children have died, have become severely injured, physically or mentally, and have experienced trauma from techniques like restraint and seclusion.¹¹⁹ Another boy in kindergarten was restrained three times in less than one month in his U.S. Cerebral Palsy School in Orange County.¹²⁰ One of those times, he was restrained and held face down for forty-five minutes, and the school did not have the parents' consent to restrain their child.¹²¹ A parent said there could be harmful consequences every time a disabled child is restrained.¹²² From this incident the boy developed "post-traumatic stress disorder, epilepsy and autism-spectrum behaviors."¹²³ Now seven, the boy is still hurt from his experience of being restrained for non-aggressive behavior, and cries for no reason.¹²⁴ His father said "[i]t damage[d] [his son's] core belief that [he is] safe" in school.¹²⁵ Another case involved a Florida teen that had post-traumatic stress disorder from being dangerously restrained and repeatedly secluded, and as a result the boy had to be admitted to a psychiatric facility.¹²⁶ The court did not find the school's acts to be excessive, egregious or a shock to the conscience, even when the school did not have parental consent to physically restrain or seclude the child.¹²⁷

116. Mulay, *supra* note 47, at 325–26; Jean-Paul Renaud, *Teacher, Aide Arrested on Child-Abuse Charges—First-Grade Students Say They Were Tied up for Misbehaving*, SUN SENTINEL, Oct. 10, 2003, at 1B.

117. Renaud, *supra* note 116.

118. *Id.*

119. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 25, at 9.

120. Lauren Roth, *Orange County Schools Still Restrain the Most Students*, ORLANDO SENTINEL, Aug. 26, 2012, http://articles.orlandosentinel.com/2012-08-26/news/os-orange-florida-restraint-seclusion-20120825_1_restraint-and-seclusion-orange-schools-superintendent-barbara-jenkins.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Roth, *supra* note 120.

126. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 113TH CONG., REP. ON DANGEROUS USE OF SECLUSION AND RESTRAINTS IN SCHOOLS REMAINS WIDESPREAD AND DIFFICULT TO REMEDY: A REVIEW OF TEN CASES 4 (Comm. Print 2014) [hereinafter STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 113TH CONG.].

127. *Id.* at 19.

A. *Child with a Disability Definition*

[A] *child with a disability*—[in general]—means a child—

(i) with intellectual disabilities, hearing impairments—including deafness—speech or language impairments, visual impairments—including blindness—serious emotional disturbance, referred to in this chapter as *emotional disturbance*, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

....

The term *child with a disability* for a child aged [three] through [nine]—or any subset of that age range, including ages [three] through [five]—may, at the discretion of the State and the local educational agency, include a child—

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in [one] or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.¹²⁸

B. *Florida Restraint Regulations*

The Department’s Office for Civil Rights (“OCR”) started researching and collecting data on how many times restraint and seclusion occurred in schools in 2009.¹²⁹ The OCR did this research as part of the Department’s 2009 to 2010 Civil Rights Data Collection (“CRDC”).¹³⁰ For this study, the OCR and the CRDC had to come up with definitions for restraint and seclusion because they had not yet been defined by federal statute.¹³¹ Today, the Florida statutes and the Florida Administrative Code

128. 20 U.S.C. § 1401(3)(A)–(B) (2012).

129. U.S. DEP’T OF EDUC., *supra* note 82, at 9.

130. *Id.*

131. *See id.* at 7, 10. *But see* FLA. STAT. § 393.063(32)–(33) (2014).

provide definitions and regulations on reactive strategies such as restraint and seclusion.¹³² The most common type of restraint used in school on disabled students is physical or mechanical restraint.¹³³

Florida Statute section 393.063(32) defines restraint as “a physical device, method, or drug used to control dangerous behavior.”¹³⁴ Section 393.063 of the Florida Statutes defines physical or manual restraint as “any manual method or physical or mechanical device, material, or equipment attached or adjacent to an individual’s body so that he or she cannot easily remove the restraint and which restricts freedom of movement or normal access to one’s body.”¹³⁵ The Florida Administrative Code adds to this statute by including specific time periods and defining what physical restraint does not include.¹³⁶ The Florida Administrative Code provides that manual restraint is when a person uses his hands or body to physically

immobilize a person’s freedom of movement or normal access to his or her body for more than fifteen continuous seconds. It does not include physically guiding a client during transport or skill training for up to two minutes. Repeated applications and releases of manual restraint in order to circumvent the fifteen-second and two-minute criteria are prohibited.¹³⁷

The term mechanical restraint is defined as “a physical device used to restrict an individual’s movement or restrict the normal function of the individual’s body.”¹³⁸ “This term does not include devices [that are] implemented by trained school personnel or [used] by a student” that has a medical or service need that has been prescribed by a doctor or related services professional, and the student is using it for its appropriate purpose.¹³⁹ Some of these approved mechanical restraint devices are devices that support a student’s spine so the student can sit up straight, have more

132. E.g., FLA. STAT. § 393.063(32)–(33); FLA. ADMIN. CODE ANN. r. 65G-8.001 (2014). “*Reactive strategies* means . . . procedures or physical crisis management techniques of seclusion or manual, mechanical, or chemical restraint utilized for control of behaviors that create an emergency or crisis situation.” FLA. ADMIN. CODE ANN. r. 65G-8.001(15).

133. See NAT’L DISABILITY RIGHTS NETWORK, *supra* note 25, at 9–10; Heather Vogell, *Violent and Legal: The Shocking Ways School Kids Are Being Pinned Down, Isolated Against Their Will*, PROPUBLICA (June 19, 2014, 5:00 AM), <http://www.propublica.org/article/schools-restraints-seclusions>.

134. FLA. STAT. § 393.063(32).

135. *Id.* § 393.063(32)(a).

136. See FLA. ADMIN. CODE ANN. r. 65G-8.001(12), (17).

137. *Id.* r. 65G-8.001(12).

138. *Id.* r. 65G-8.001(13).

139. U.S. DEP’T OF EDUC., *supra* note 82, at 10; see also FLA. STAT. § 393.063(32)(b)–(c); FLA. ADMIN. CODE ANN. r. 65G-8.001(13).

mobility, and improve their balance.¹⁴⁰ These devices are approved because the student would not be able to do any of these things without the support from mechanical restraints.¹⁴¹ Most often, mechanical restraints are “straps, handcuffs or bungee cords.”¹⁴² Other mechanical restraints that are allowed are mechanical safety restraints used for transportation purposes, mechanical restraints used for medical immobilization, and orthopedically prescribed restraint devices that allow a student to participate in activities without causing harm to himself.¹⁴³ A student who is being mechanically restrained must be allowed to move for a minimum of ten minutes for every hour that the student is restrained.¹⁴⁴

Chemical restraint is using medication to control and alter a disabled student’s behavior immediately.¹⁴⁵ Chemical restraint is only allowed when there is written authorization from “an authorized physician who has [established] that the chemical [medication] is the least restrictive, most appropriate alternative available.”¹⁴⁶ The authorizing physician must be present or must be on the telephone when a trained and authorized staff person examines the disabled child.¹⁴⁷ If a disabled child is restrained, an authorized, certified, and trained staff member must observe the student during the restraint to monitor heart rate and determine when the release criteria have been reached.¹⁴⁸ Every effort must be made before using any type of restraint on a student.¹⁴⁹ Restraint used for a period of more than one hour on a disabled student “require[s] approval by an authoriz[ed] agent”; if it exceeds two hours, then the teacher needs to visually examine the student and receive re-approval from the authorized agent.¹⁵⁰

140. See FLA. STAT. § 393.063(32)(c); FLA. ADMIN. CODE ANN. r. 65G-8.001(13)(c); U.S. DEP’T OF EDUC., *supra* note 82, at 10.

141. See U.S. DEP’T OF EDUC., *supra* note 82, at 10.

142. Vogell, *supra* note 133.

143. FLA. ADMIN. CODE ANN. r. 65G-8.001(13); U.S. DEP’T OF EDUC., *supra* note 82, at 10.

144. FLA. ADMIN. CODE ANN. r. 65G-8.007(10).

145. *Id.* r. 65G-8.001(5), .008(1).

146. *Id.* r. 65G-8.008(2).

147. *Id.* r. 65G-8.008(3).

148. *Id.* r. 65G-8.005(3), .007(3); .008(3). A staff member or school personal authorized to use

mechanical restraint must be a Certified Behavior Analyst certified by the Behavior Analyst Certification Board [R], Inc.; a behavior analyst certified by the Agency pursuant to [s]ection 393.17 [of the Florida Statutes], and by Rule 65G-4.003 [of the Florida Administrative Code]; a physician licensed under [c]hapter 458 or 459 [of the Florida Statutes]; a psychologist licensed under [c]hapter 490 [of the Florida Statutes]; or a clinical social worker, marriage and family therapist, or mental health counselor licensed under [c]hapter 491 [of the Florida Statutes].

FLA. ADMIN. CODE ANN. r. 65G-8.005(3)(c).

149. *Id.* r. 65G-8.007(1).

150. *Id.* r. 65G-8.007(4)–(5).

The following restraints are prohibited from use:

1. Reactive strategies involving noxious or painful stimuli, as prohibited by [s]ection 393.13(4)(g), [of the Florida Statutes];
2. Untested or experimental procedures;
3. Any physical crisis management technique that might restrict or obstruct an individual's airway or impair breathing, including techniques whereby staff persons use their hands or body to place pressure on the client's head, neck, back, chest, abdomen, or joints;
4. Restraint of an individual's hands, with or without a mechanical device, behind his or her back;
5. Physical holds relying on the inducement of pain for behavioral control;
6. Movement, hyperextension, or twisting of body parts;
7. Any maneuver that causes a loss of balance without physical support—such as tripping or pushing—for the purpose of containment;
8. Any reactive strategy in which a pillow, blanket, or other item is used to cover the individual's face as part of the restraint process;
9. Any reactive strategy that may exacerbate a known medical or physical condition, or endanger the individual's life;
10. Use of any containment technique medically contraindicated for an individual;
11. Containment without continuous monitoring and documentation of vital signs and status with respect to release criteria¹⁵¹

C. *Florida Seclusion Regulations*

Most people equate secluding a disabled child with putting the child in a time out period.¹⁵² However, the Florida Administrative Code explicitly

151. *Id.* r. 65G-8.009(1)–(11).

152. *See Seclusion in Developmental Disability Facilities*, DISABILITY RTS. FLA., http://www.disabilityrightsflorida.org/resources/disability_topic_info/seclusion_in_developmental_disability_facilities (last visited Sep. 5, 2015).

provides seclusion is not a time out.¹⁵³ If a teacher puts a disabled student in time out and it exceeds the duration of twenty consecutive minutes, the time out has now been converted into a reactive strategy of seclusion.¹⁵⁴ Seclusion is defined as “involuntary isolation of a person in a room or area from which the person is prevented from leaving.”¹⁵⁵ There must be an authorized and trained staff member present to approve the school personnel’s action to seclude the student.¹⁵⁶ Any room where the disabled student is going to be secluded must have adequate lighting and ventilation to allow the student to breathe at a normal pace.¹⁵⁷ The room must also have enough space for the student to lie down comfortably.¹⁵⁸ The door to the room must be unlocked when the student is secluded without being monitored by a staff member.¹⁵⁹ “[T]he door can be held shut by a staff person using a spring bolt, magnetic hold, or other mechanism” that enables the student to leave the room if the teacher leaves the locale.¹⁶⁰ Before a teacher uses seclusion, all other options must have been used, and there must be a threat of imminent danger to the student or to others.¹⁶¹ Use of a reactive strategy must be continuously monitored, be the least possible restriction for its use, and end when the emergency ends.¹⁶² If the seclusion lasts for more than one hour, it needs to be approved by an authorized agent; if it lasts more than two hours, then the teacher must observe the student before seeking re-approval.¹⁶³

153. FLA. ADMIN. CODE ANN. r. 65G-8.001(16). Time out is very short and can only last from one minute to twenty consecutive minutes. *Id.* r. 65G-8.001(17)(a).

154. *Id.* r. 65G-8.001(17); *see also supra* note 132 and accompanying text.

155. FLA. STAT. § 393.063(33) (2014); *see also* FLA. ADMIN. CODE ANN. r. 65G-8.001(16).

156. *See* FLA. ADMIN. CODE ANN. r. 65G-8.005(3)(d)–(e). The authorized staff member must have at a minimum:

[A] bachelor’s degree, two years of experience serving individuals with developmental disabilities, and be certified in reactive strategies through an Agency-approved emergency procedure curriculum; and [t]he authorizing agent or staff person with approval authority for manual restraint must be certified in reactive strategies through an Agency-approved emergency procedure curriculum.

Id.

157. *Id.* r. 65G-8.007(8).

158. *Id.*

159. *Id.* r. 65G-8.007(9).

160. FLA. ADMIN. CODE ANN. r. 65G-8.007(9).

161. *See id.* r. 65G-8.001(15), .006(1)–(2).

162. *Id.* r. 65G-8.006(4)–(6).

163. *Id.* r. 65G-8.007(4)–(5).

D. *Florida Statutes and Regulations That Are Supposed to Protect Students from Restraint and Seclusion*

Florida labels children with disability as exceptional students because they are eligible for special programs and services approved by the Board of Education.¹⁶⁴ Special education services are defined as designed instruction and services, which are necessary for exceptional students to benefit from their education.¹⁶⁵ Some special services that may be included for exceptional students are: transportation, physical therapy, aide for the blind, braillists, counseling, speech therapy, assistive technology devices, and mental health services.¹⁶⁶ Reactive strategies, such as types of restraint and seclusion, must neither be implemented robotically—as soon as a teacher sees or punishes undesirable behavior—nor for the convenience of school personnel.¹⁶⁷ The restraint and seclusion must stop when the emergency ends.¹⁶⁸ For a teacher to become a special education teacher, the teacher must: (1) have received certification of a special education teacher or passed a Florida special education teacher license exam; (2) have not had a special education certification or license be waived for any basis; and (3) have at least a bachelor's degree.¹⁶⁹

To provide meaningful protection against restraint or seclusion for disabled students, a state can either: (1) “provide[] multiple protections against restraint or seclusion for students”; or (2) “ha[ve] few protections but strictly limit[] the technique to emergency threats of physical harm. This designation does not necessarily mean that a state’s laws provide sufficient protection”¹⁷⁰ The State of Florida has statutes that prohibit restraint or seclusion when the student’s breathing is compromised, but it does not limit it to emergency situations only.¹⁷¹

164. FLA. STAT. § 1003.01(3)(a) (2014).

165. *Id.* § 1003.01(3)(b).

166. *Id.* Special services can include:

[T]ransportation; diagnostic and evaluation services; social services; physical and occupational therapy; speech and language pathology services; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; services provided by a certified listening and spoken language specialist; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board.

Id.

167. FLA. ADMIN. CODE ANN. r. 65G-8.006(2).

168. FLA. STAT. § 393.13(4)(h).

169. 20 U.S.C. § 1401(10)(B) (2012); 34 C.F.R. § 300.18(b) (2013).

170. BUTLER, *supra* note 47, at 12 n.33.

171. *Id.* at 14 n.35; *see also* FLA. STAT. § 1003.573(4).

Florida Statute, section 393.13, provides that a disabled person has a right to be free from harm.¹⁷² This includes any “unnecessary physical, chemical, or mechanical restraint, isolation . . . abuse, [and] neglect.”¹⁷³ This statute also provides that discriminating against disabled children and excluding disabled children from any program or activity that is publicly funded is prohibited.¹⁷⁴

Florida Statute, section 1003.57, defines five options disabled students have for a classroom environment in school.¹⁷⁵ The first option is learning in a regular classroom where the disabled student spends eighty percent or more of his time learning with non-disabled students during the week.¹⁷⁶ The second option is in a resource room where the disabled student spends “[forty] to [eighty] percent of the school week with non-disabled” students.¹⁷⁷ The third option is in a separate class where the disabled student “spends less than [forty] percent of the school week with non-disabled” students.¹⁷⁸ The fourth option is a *separate environment* which is where the disabled student is sent to a “separate private school, residential facility, or hospital or homebound program.”¹⁷⁹ The last option is an “[e]xceptional student education center or special day school,” where the disabled student attends “a separate public school to which non-disabled peers do not have access.”¹⁸⁰ When making the IEP, after the student is found eligible to receive an exceptional student education (“ESE”), all of these options should be discussed with the parents and student.¹⁸¹ The statute also requires the school district to communicate to the parents what services are available and appropriate for the student.¹⁸² At the IEP meeting, the school district must disclose how much money it receives from the state for ESE support levels for a full time student.¹⁸³ The school district must also approve the student’s IEP if it can be implemented at the student’s current school, or deny the IEP when it cannot be implemented at the student’s current school.¹⁸⁴

Florida almost made it to the weak category of states on laws protecting children, but it is now in the bottom of the states that provide

172. FLA. STAT. § 393.13(3)(g).

173. *Id.*

174. *Id.* § 393.13(3)(i).

175. *Id.* § 1003.57(1)(a).

176. *Id.* § 1003.57(1)(a)(1)(c).

177. FLA. STAT. § 1003.57(1)(a)(1)(d).

178. *Id.* § 1003.57(1)(a)(1)(e).

179. *Id.* § 1003.57(1)(a)(1)(b).

180. *Id.* § 1003.57(1)(a)(1)(a).

181. *See id.* § 1003.57.

182. FLA. STAT. § 1003.57(1)(g).

183. *Id.* § 1003.57(1)(j).

184. *Id.* § 1003.57(3)(c).

meaningful protection.¹⁸⁵ Florida did not make it in the weak category of state laws on protecting children because of its strong data collection on abuse instances.¹⁸⁶ Florida monitors all of its schools by district to make sure the schools are complying with state laws, and then publishes the findings on the Department of Education's website.¹⁸⁷

1. Florida's Monitoring and Reporting Systems

Florida's strong monitoring system is due to the 2010 Florida Legislature passing House Bill 1073 which created section 1003.573 of the Florida Statutes.¹⁸⁸ The statute, titled Restraint and Seclusion on Students with Disabilities, directly focuses on the problem of restraining and secluding disabled children, even though there are schools where nondisabled children are secluded and restrained.¹⁸⁹ Nevertheless, two years after this statute was implemented, Florida still had problems with monitoring and reporting.¹⁹⁰ From 2011 to 2012, one set of data from the Florida Department of Education stated there were four times as many students who were secluded in rooms "than a second set of data [called] the School Environmental Safety Incident Report ("SESIR")."¹⁹¹ Some districts only view SESIR as a place to report disciplinary incidents and not restraint and seclusion incidents.¹⁹² Cheryl Elters, a representative for the Florida Department of Education, stated that school district personnel do not realize they need to record restraint and seclusion data in two places.¹⁹³ The disconnect comes from how restraint and seclusion are used in schools because most of these techniques are used on disabled children.¹⁹⁴ Teachers use restraint and seclusion on disabled children and view it not as a disciplinary action for a behavior, but they view it as a safety precaution.¹⁹⁵

185. BUTLER, *supra* note 47, at 12–13.

186. *Id.* at 12–13, 92.

187. *Id.* at 13, 91; *see also, e.g.*, FLA. DEP'T OF EDUC., 2013-14 EXCEPTIONAL STUDENT EDUCATION MONITORING AND ASSISTANCE ON-SITE VISIT REPORT FOR SEMINOLE COUNTY SCHOOL DISTRICT 1 (2014), <http://www.fldoe.org/core/fileparse.php/7673/urlt/1314OSSeminole.pdf>.

188. FLA. STAT. § 1003.573 (2014); H.R. 1073, Reg. Sess., at 1 (Fla. 2010).

189. FLA. STAT. § 1003.573; *see also* BUTLER, *supra* note 47, at 10.

190. *See* Sarah Gonzalez & John O'Connor, *Florida Keeps Two Sets of Seclusion Data—And Why Neither May Tell the Full Story*, STATE IMPACT, (Aug. 14, 2012, 12:19 PM), <http://stateimpact.npr.org/florida/2012/08/14/florida-keeps-two-sets-of-seclusion-data-and-why-neither-may-tell-the-full-story/>.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Gonzalez & O'Connor, *supra* note 190.

Teachers use restraint and seclusion when disabled students exhibit dangerous behaviors that can cause a danger to themselves or others.¹⁹⁶ Teachers also use restraint or seclusion as a disciplinary action to break up a school fight.¹⁹⁷ This is why there is a discrepancy in both sets of data.¹⁹⁸ Even with these two sets of data, we still do not know the amount of disabled children restrained and secluded—one reason is because school personnel do not report to both data collections, and the other reason is because it occurs in the classroom where it is most likely not going to be reported.¹⁹⁹ Monitoring restraint and seclusion on disabled students should occur at the “classroom, building, district, and state levels.”²⁰⁰

The research collected from all Florida school districts is available on the Disability Rights Florida website,²⁰¹ and when you find a report, it links to the Florida Department of Education website for the charts.²⁰² In 2012, there were only nine Florida counties that were authorized to use mechanical restraint.²⁰³ From August 1, 2011 through June 30, 2012, there were a total of 9712 incidents of restraint, and there were 4347 disabled students.²⁰⁴ Forty-six percent of all disabled students restrained were in pre-kindergarten through third grade.²⁰⁵ The students were restrained on average for eleven minutes; forty-five percent of students restrained were white and eighty-four percent were male.²⁰⁶ From August 1, 2011 through June 30, 2012, there were a total of 4193 incidents of seclusion, and there were 1435 disabled students.²⁰⁷ Forty-two percent of these children that were secluded were in pre-kindergarten through third grade, and forty-three percent that

196. *Id.*

197. *Id.*

198. *See id.*

199. *Id.*

200. FLA. STAT. § 1003.573(2)(a) (2014).

201. *Restraint and Seclusion—County by County*, DISABILITY RIGHTS FLA., http://www.disabilityrightsflorida.org/resources/disability_topic_info/restraint_and_seclusion_county_by_county (last visited Sep. 5, 2015).

202. *E.g.*, BUREAU OF EXCEPTIONAL EDUC. & STUDENT SERVS., FLA. DEP’T OF EDUC., *RESTRAINT INCIDENTS BY DISTRICT: AUGUST 1, 2013 THROUGH JUNE 30, 2014*, available at http://www.disabilityrightsflorida.org/documents/RS_County_by_County/Aug_2013_to_June_2014_Detail.pdf (last visited Sep. 5, 2015).

203. *Restraint and Seclusion—County by County*, *supra* note 201. The nine counties that were authorized to use mechanical restraint in 2012 were: Alachua, Hillsborough, Levy, Madison, Manatee, Marion, Pinellas, Orange, and Santa Rosa. *Id.*

204. BUREAU OF EXCEPTIONAL EDUC. & STUDENT SERVS., FLA. DEP’T OF EDUC., *RESTRAINT INCIDENTS BY DISTRICT: AUGUST 2011 THROUGH JUNE 2012*, available at http://www.disabilityrightsflorida.org/documents/RS_County_by_County/August_to_June_various_2012.pdf (last visited Sep. 5, 2015).

205. *Id.*

206. *Id.*

207. *Id.*

were secluded were in fourth grade through eighth grade.²⁰⁸ The students were secluded on average for twenty minutes; forty-five percent of the students secluded were black and eighty-three percent were male.²⁰⁹

From August 1, 2012 through June 30, 2013, there were a total of 9218 incidents of restraint, and there were 4000 students with disabilities.²¹⁰ Forty-nine percent of the restrained students were in pre-kindergarten through third grade.²¹¹ From August 1, 2012 through June 30, 2013, there were a total of 2913 incidents of seclusion, and there were 1145 students with disabilities.²¹² Forty-seven percent of these students were in fourth grade through eighth grade.²¹³

From August 1, 2013 through June 30, 2014, there were a total of 8895 incidents of restraint, and there were 3461 students with disabilities.²¹⁴ Forty-eight percent of disabled students restrained were in pre-kindergarten through third grade.²¹⁵ From August 1, 2013 through June 30, 2014, there were a total of 2264 incidents of seclusion, and there were 882 students with disabilities.²¹⁶ Forty-four percent of seclusion incidents occurred with students from fourth to eighth grade.²¹⁷

One example of how school districts are changing due to the reporting of restraint and seclusion of disabled children is Orange County.²¹⁸ Orange County eliminated seclusion of disabled students in 2012.²¹⁹ Orange County schools still restrain the most students.²²⁰ “Restraint and seclusion are totally out of control,” says one parent of a disabled child.²²¹ She says, “children . . . us[e] behaviors to communicate,” and school teachers “need to understand that.”²²² The guideline from the U. S. Secretary of Education, Mr. Arne Duncan, says restraint and seclusion should never be used as

208. *Id.*

209. BUREAU OF EXCEPTIONAL EDUC. & STUDENT SERVS., *supra* note 204.

210. BUREAU OF EXCEPTIONAL EDUC. & STUDENT SERVS., FLA. DEP’T OF EDUC., RESTRAINT INCIDENTS BY DISTRICT: AUGUST 1, 2012 THROUGH JUNE 30, 2013, *available at* http://disabilityrightsflorida.org/documents/August_2012_-_June_2013_by_county_disability_type_and_strategy.pdf (last visited Sep. 5, 2015).

211. *Id.*

212. *Id.*

213. *Id.*

214. BUREAU OF EXCEPTIONAL EDUC. & STUDENT SERVS., *supra* note 202.

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Roth, *supra* note 120.

219. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., *supra* note 126, at 21; Roth, *supra* note 120.

220. Roth, *supra* note 120.

221. *Id.*

222. *Id.*

punishment or discipline.²²³ This guideline is also in compliance with Florida Administrative Code chapter 65G-8.006, section 2.²²⁴ The guidelines state wrap mats should never be used as a mechanical restraint.²²⁵ In Orange County, Florida, schools still use wrap mats to strap disabled students lying flat against a board.²²⁶ Anna Diaz, head of a special education service in Orange County, Florida, said restraining a disabled student should only be used when the student is in imminent danger of hurting himself or others.²²⁷ This statement is in accord with the guidelines, but saying it and doing it by implementing and overseeing that those guidelines are being followed, are two different things.²²⁸

Every school in Florida must have a policy that discusses restraint and seclusion of students.²²⁹ These policies must follow chapter 65G-8.003 of the Florida Administrative Code.²³⁰ These policies must also include the district's plan to reduce or eliminate restraint and seclusion, which may include additional training in positive behavioral support and crisis management, parental involvement, and more student evaluation.²³¹ With the passage of this law, Florida school districts and school personnel are banned from using any mechanical or physical "restraint that restricts a student's breathing."²³² Florida schools and school personnel are also prohibited from "clos[ing], lock[ing], or physically block[ing] a student in a room that is unlit and does not meet the rules of the State Fire Marshal for seclusion time-out rooms."²³³

2. Documentation Requirement

Florida Statutes, section 1003.573 makes it a requirement that every incident of restraint or seclusion be documented and reported within twenty-four hours.²³⁴ This report must contain the following items:

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- 223. *Id.*
 - 224. FLA. ADMIN. CODE ANN. r. 65G-8.006(2) (2014).
 - 225. Roth, *supra* note 120.
 - 226. *Id.*
 - 227. *Id.*
 - 228. *See id.*
 - 229. FLA. STAT. § 1003.573(3)(a) (2014); *Seclusion in Developmental Disability Facilities*, *supra* note 152.
 - 230. FLA. ADMIN. CODE ANN. r. 65G-8.003(1) (2014).
 - 231. FLA. STAT. § 1003.573(3)(a)(6)(a)–(b), (e); *see* FLA. ADMIN. CODE ANN. r. 65G-8.003(1).
 - 232. FLA. STAT. § 1003.573(4); FLA. ADMIN. CODE ANN. r. 65G-8.009(3).
 - 233. FLA. STAT. § 1003.573(5); *see also* FLA. ADMIN. CODE ANN. r. 69A-58.0084(1)–(5) (2014).
 - 234. FLA. STAT. § 1003.573(1)(a).

1. The name of the student restrained or secluded.
2. The age, grade, ethnicity, and disability of the student restrained or secluded.
3. The date and time of the event and the duration of the restraint or seclusion.
4. The location at which the restraint or seclusion occurred.
5. A description of the type of restraint used in terms established by the Department of Education.
6. The name of the person using or assisting in the restraint or seclusion of the student.
7. The name of any nonstudent who was present to witness the restraint or seclusion.
8. A description of the incident, including:
 - a. The context in which the restraint or seclusion occurred.
 - b. The student's behavior leading up to and precipitating the decision to use manual or physical restraint or seclusion, including an indication as to why there was an imminent risk of serious injury or death to the student or others.
 - c. The specific positive behavioral strategies used to prevent and deescalate the behavior.
 - d. What occurred with the student immediately after the termination of the restraint or seclusion.
 - e. Any injuries, visible marks, or possible medical emergencies that may have occurred during the restraint or seclusion, documented according to district policies.
 - f. Evidence of steps taken to notify the student's parent or guardian.²³⁵

This statute provides that a restraint or seclusion incident report should include: Everything about the child, the child's disability, the reason the teacher used restraint or seclusion, and what the teacher did to prevent the situation from escalating to having to use restraint or seclusion.²³⁶

235. *Id.* § 1003.573(1)(b).

236. *Id.*

Implied by this statute is that physical restraint or seclusion must be used only if there is “an imminent risk of serious injury or death to the student or others.”²³⁷ Nevertheless, this requirement is implicit in an incident report, and it is not specifically provided as a requirement before a teacher can restrain or seclude a disabled student.²³⁸ It can be interpreted that restraint and seclusion can be used for any reason, and there does not need to be any threat of serious bodily injury or harm before restraint or seclusion can be used on the student.²³⁹

Documentation of the abuse should be given to the “school principal, the district director of [ESE], and the bureau chief of the Bureau of Exceptional Education and Student Services electronically each month that the school is in session.”²⁴⁰ This data should be reported to the Florida Department of Education so it can analyze the data and figure out what methods were most used and by what county.²⁴¹ Parents or students can also fill out a complaint form online about an incident that occurred at school, and OCR will investigate it.²⁴²

Nevertheless, even with all these laws on documenting these abusive incidents, a Florida disabled teen was continuously restrained using the dangerous technique of prone restraint, and most of the documents were either incomplete or missing.²⁴³ Prone restraint is when the student is forced to put his face down for a period of time.²⁴⁴ Florida once banned school personnel from using prone restraint techniques; however, that restriction was later removed by legislators.²⁴⁵ This student was restrained at least eighty-nine times over a fourteen-month period, which included twenty-seven prone restraints.²⁴⁶ This student could not tell his parents because his disability interfered with his ability to communicate.²⁴⁷ His parents discovered the abuse that had occurred in school when the student’s

237. See *id.* § 1003.573(1)(b)(8)(b).

238. BUTLER, *supra* note 47, at 25–26 n.53.

239. See *id.*; JESSICA BUTLER, THE AUTISM NAT’L COMM., MY STATE’S SECLUSION & RESTRAINT LAWS: BRIEF SUMMARIES OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES 15 (2013), available at <http://www.autcom.org/pdf/MyStateRestraintSeclusionLaws.pdf>.

240. FLA. STAT. § 1003.573(2)(b).

241. See *id.* § 1003.573(2)(c).

242. OCR Complaint Consent Form, OFFICE FOR CIVIL RIGHTS COMPLAINT ASSESSMENT SYS., <https://ocrcas.ed.gov/cas.cfm> (last visited Sep. 5, 2015).

243. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., *supra* note 126, at 19.

244. Mulay, *supra* note 47, at 330.

245. *Id.* at 331, 332 & n.40.

246. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., *supra* note 126, at 17.

247. *Id.* at 19.

“outbursts became so debilitating that he had to be removed from the school.”²⁴⁸ When his parents requested the logs the school used to document restraint and seclusion, the “logs were incomplete or missing.”²⁴⁹ The parent’s attorney believed that without all of the documentation completely filled out—and the logs that were missing—“it was impossible to substantiate the parents’ claims that the school had been indifferent to their child’s suffering.”²⁵⁰ In this case, the disabled student had to be put into a psychiatric facility as a direct result from the harm he suffered when teachers put him in repeated restraint and seclusion.²⁵¹ The court did not find the school’s actions to be excessive, egregious, or a shock to the conscious because the court “do[es] not take . . . psychological trauma [evidence] as seriously as . . . physical injury” evidence.²⁵²

V. CORPORAL PUNISHMENT IN SCHOOLS VIOLATES DISABLED STUDENTS’ CONSTITUTIONAL RIGHTS TO BE FREE FROM EXCESSIVE CORPORAL PUNISHMENT AND DISCRIMINATED AGAINST SOLELY DUE TO THEIR DISABILITIES

A. *Procedural Due Process*

A child with a disability should never be restrained or secluded in school unless it is for the safety of others or for the child’s safety.²⁵³ Corporal punishment on disabled students will not give rise to the procedural due process rights in the U.S. Constitution, unless the corporal punishment is for disciplinary reasons, and it does not violate the common law privilege of teachers being able to use reasonable force—but not excessive force—to educate and discipline a child.²⁵⁴ Public and private schools use restraint and seclusion methods to try to control disabled students.²⁵⁵

The Fourteenth Amendment to the U.S. Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

248. *Id.*

249. *Id.*

250. *Id.*

251. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., *supra* note 126, at 26.

252. *Id.*

253. BUTLER, *supra* note 47, at 1, 10.

254. *See* Ingraham v. Wright, 430 U.S. 651, 661, 676 (1977).

255. *See* NAT’L DISABILITY RIGHTS NETWORK, *supra* note 25, at 7.

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁵⁶

This means that public schools and its representatives—like teachers, aides, and specialists—cannot deprive any disabled child of his life or liberty without the due process of the law.²⁵⁷ The Fourteenth Amendment further implies that disabled children must have equal protection of the laws of the United States, and no person can deprive them of the rights that they are entitled to by being citizens of the United States.²⁵⁸ No state can “deprive [a] person of life, liberty, or property [interest] without [the] due process of law.”²⁵⁹ The Supreme Court of the United States has rejected the argument that any grave loss upon a person from the state is a violation of the Fourteenth Amendment.²⁶⁰ For there to be a violation of the Fourteenth Amendment, the Court looks toward the nature of the interest at issue.²⁶¹

The test to determine if the Fourteenth Amendment is applicable is: (1) whether the individual’s interest is an interest within the Fourteenth Amendment’s life, liberty, or property interests; and (2) if the Fourteenth Amendment life, liberty, or property interests are implemented, what process of law is due.²⁶²

The liberty interest of the Fourteenth Amendment “encompass[es] freedom from bodily restraint and punishment.”²⁶³ The State cannot physically punish a person unless the punishment is in agreement with due process of law.²⁶⁴

In *Ingraham v. Wright*,²⁶⁵ the Supreme Court held that corporal punishment in public schools is associated with the constitutionally protected liberty interest of the Fourteenth Amendment.²⁶⁶ This is because when a school official, acting under color of state law, punishes a child for behavior by restraining the child and physically hurting the child, the liberty interest of

256. U.S. CONST. amend. XIV, § 1.

257. *See id.*

258. *See id.*

259. *Id.*

260. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

261. *Id.*

262. *Id.*

263. *Id.* at 673–74.

264. *Id.* at 674.

265. 430 U.S. 651 (1977).

266. *Id.* at 674.

the Fourteenth Amendment is implicated.²⁶⁷ But it “h[e]ld that the traditional common law remedies [were] adequate to afford due process” of law.²⁶⁸

The Supreme Court has held that corporal punishment restraining the child’s freedom of movement violates the Fourteenth Amendment.²⁶⁹ The first step of the test is satisfied when Florida special education teachers, acting under color of state law, inflict corporal punishment on disabled students in public school by forcibly restraining them against their will.²⁷⁰

The next step is to determine what process of law is due.²⁷¹ To determine what process is due, the Supreme Court applies the *Mathews v. Eldridge*²⁷² three-part test:

(1) [what is] the private interest that will be affected . . . ; (2) the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and . . . (3) the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁷³

The Supreme Court has repeatedly stated that when a state actor inflicts corporal punishment on a child in school by restraining the child that involves serious physical pain, it implicates the liberty interest of the Fourteenth Amendment.²⁷⁴ The importance of the liberty interest is freedom of movement, and it can be argued that it is not only the liberty interest at stake, but the life interest is also implicated if the student restrained is restrained too long or improperly.²⁷⁵ This is because when a school actor restrains a child and inflicts excessive corporal punishment the child could die, and there have been cases reported where children have died from excessive corporal punishment.²⁷⁶

In *Goss v. Lopez*,²⁷⁷ the Court held that “a student must be given [notice and] an . . . opportunity to be heard [at an informal hearing] before

267. *Id.*

268. *Id.* at 672.

269. *Id.* at 674.

270. *Ingraham*, 430 U.S. at 674 (holding that any corporal punishment inflicted on a student in public school by a state actor implicates the Fourteenth Amendment liberty interest).

271. *Id.*

272. 424 U.S. 319 (1976).

273. *Id.* at 335.

274. *Ingraham*, 430 U.S. at 674, 676; *see also* U.S. CONST. amend XIV.

275. *See Ingraham*, 430 U.S. at 673–74.

276. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 47, at 8–11.

277. 419 U.S. 565 (1975).

[the student] is . . . suspended from public school.”²⁷⁸ At the very least, the minimum due process requirements that are due when a state actor arbitrarily deprives a person of a liberty interest are notice and an opportunity to be heard.²⁷⁹ The suggestion from *Goss* and *Ingraham* for procedural due process purposes is that, for a student to be suspended ten days or more, the school must give the student notice and an opportunity to be heard.²⁸⁰ Nevertheless, for a school official to inflict serious pain and corporal punishment on a student there is no requirement for notice or an opportunity to be heard.²⁸¹

The *Ingraham* Court distinguished *Goss* by stating:

Unlike *Goss* . . . , this case does not involve the state-created property interest in public education. The purpose of corporal punishment is to correct a child’s behavior without interrupting his education. That corporal punishment may, in a rare case, have the unintended effect of temporarily removing a child from school affords no basis for concluding that the practice itself deprives students of property protected by the Fourteenth Amendment.

Nor does this case involve any state-created interest in liberty going beyond the Fourteenth Amendment’s protection of freedom from bodily restraint and corporal punishment.²⁸²

The *Ingraham* Court held that the United States allows reasonable corporal punishment as long as it is not excessive.²⁸³ This demonstrates that a balance must be struck between the state’s interest of furthering education—which sometimes requires reasonable corporal punishment—and the student’s interest of personal security and freedom of movement.²⁸⁴ The Court stated the prevalent rule, which is that teachers and administrators can exert a reasonable amount of force for what they “‘reasonably believe[] to be [required] for [the student’s] proper control, training, or education.’”²⁸⁵

The next part of the test is: What procedural safeguards are due?²⁸⁶ Florida has procedural safeguards in place if a student is punished by a

278. *Ingraham*, 430 U.S. at 692 (White, J., dissenting); *Goss*, 419 U.S. at 581.

279. *Goss*, 419 U.S. at 579.

280. *Ingraham*, 430 U.S. at 682; *Goss*, 419 U.S. at 579.

281. *See Ingraham*, 430 U.S. at 659 n.12; *Goss*, 419 U.S. at 579.

282. *Ingraham*, 430 U.S. at 674 n.43 (citation omitted) (citing *Goss*, 419 U.S. at 565).

283. *Id.* at 676.

284. *Id.*

285. *Id.* at 661.

286. *Id.* at 674.

school teacher, and later it was found that the school teacher's use of corporal punishment was not reasonable but excessive.²⁸⁷ In such a case, tort and penal law provides a procedural safeguard and an adequate remedy.²⁸⁸ For more severe types of abuse cases than paddling a student, there are procedural safeguards in civil and criminal law when taken into consideration with the *openness of the school environment*.²⁸⁹

In *Ingraham*, the uncontradicted evidence showed that a student was paddled by a teacher and that such corporal punishment—and the pain associated with it—in Dade County public schools was rare with the exception of a few cases.²⁹⁰ Furthermore, paddling is normally inflicted in response to direct conduct of the student, and there are usually other teachers present.²⁹¹ Thus, the risk that a teacher will paddle a student “without cause is typically insignificant.”²⁹² The Court held that a teacher can paddle a student for disciplinary reasons, and this does not threaten “any substantive rights nor condemns the child ‘to suffer grievous loss of any kind.’”²⁹³ The Court would not hold that corporal punishment should be eliminated in schools because it has a deep-rooted history in the United States that serves an important educational interest; the elimination of corporal punishment must occur by its own social policy, and not by a court's ruling of a right to due process.²⁹⁴ The Court held that it is not in violation of the Fourteenth Amendment's liberty interest to not give notice and an opportunity to be heard when there are traditional common law remedies.²⁹⁵

Before 2009, the schools were not monitoring or reporting restraint and seclusion incidents on disabled children, and there were no procedural safeguards in place.²⁹⁶ Now, every Florida school district needs to create a plan of action on how to reduce restraint and seclusion, and have parental consent to restrain or seclude a child.²⁹⁷ Even though all of these laws are in place, school personnel and districts do not follow them and still restrain and

287. *Ingraham*, 430 U.S. at 677.

288. *See id.* at 677–78.

289. *Id.* at 678.

290. *Id.* at 677.

291. *Id.* at 677–78.

292. *Ingraham*, 430 U.S. at 678.

293. *Id.* at 678 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

294. *Id.* at 681.

295. *Id.* at 682. It is important to note that the *Ingraham* Court refused to review Petitioner's third argument for certiorari, which was that “the infliction of severe corporal punishment upon public school students [is] arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment.” *Id.* at 659 n.12.

296. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 3–5.

297. FLA. STAT. § 1003.573(3)(a)(6) (2014).

seclude children without consent; some do not even fill out the necessary forms after the incident.²⁹⁸ School personnel are not giving notice to the student's parents or an opportunity to be heard at a hearing because schools are trying to cover up how much they are abusing these students.²⁹⁹ Most of the time when students are restrained or secluded, teachers will say it was due to their aggressive behavior, when in reality, students had non-aggressive behavior and just had not followed a command.³⁰⁰ Most students cannot control their actions because of their disability, and when they do not follow their teacher's instructions, they are trying to communicate something other than *I am not following directions*.³⁰¹ Not following a teacher's instructions and exhibiting non-aggressive behavior are not reasons to restrain and seclude students, that is merely punishing them for their disabilities.³⁰²

Parents of the disabled child must write a complaint containing "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child," and the complaint must present "an alleged violation that occurred not more than [two] years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint."³⁰³ Also, parents must meet with the IEP board to discuss the problem in mediation.³⁰⁴ If mediation does not work, an administrative due process hearing is given, then the parents can appeal, and then they can file a civil action.³⁰⁵ Throughout the entire process, the burden of proof is on the parents and disabled child to show that the school district violated the student's rights.³⁰⁶ It is still a violation of procedural due process when a disabled student's liberty is taken away first and then the school provides them with an administrative hearing

298. See STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 113TH CONG., *supra* note 126, at 19.

299. See *id.*

300. See RESTRAINT AND SECLUSION INCIDENTS, DISABILITY RIGHTS FLA. (2012), http://www.disabilityrightsflorida.org/documents/RS_County_by_County/IDEA_State_Advisory_ppt_July_2012.pdf.

301. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., *supra* note 126, at 19; Roth, *supra* note 120; see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 8.

302. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 8; Roth, *supra* note 120.

303. 20 U.S.C. § 1415(b)(6)(A)–(B) (2012).

304. See *id.* § 1415(e)(1)–(2).

305. See 34 C.F.R. §§ 300.511, .514, .516 (2013); OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 81, at 24, 29, 31.

306. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 51 (2005); Mulay, *supra* note 47, at 341.

afterwards, only if requested by the parents or the child.³⁰⁷ This makes it seem that disabled students and parents are given their procedural due process rights.³⁰⁸ Yet, it takes time for the parents and students to go through this process before being able to file in court, while their child is still in school being abused by the teacher.³⁰⁹ However, this makes the rights of disabled children insurmountable when arguing a constitutional violation because the burden in court is too high to reach.³¹⁰ Despite all these laws to aid disabled students, in practicing these laws, disabled students have an uphill battle.³¹¹ In *Schaffer ex rel. Shaffer v. Weast*,³¹² Justice Ruth Bader Ginsburg argued that “policy considerations, convenience, and fairness” justify the high burden that should be placed upon the defendant, the school district, because they are in a *far better position* to show they had complied with the statutory requirements.³¹³ The procedural due process rights that are due are to notify the parents that the school uses restraint or seclusion techniques, the school should have the parents sign a consent form, and the parents should have a due process hearing before an incident.³¹⁴ Then, after the incident occurs, the school should notify the parents within twenty-four hours to let them know why it occurred.³¹⁵ If the parents want to have a due process hearing after, to see if it was truly necessary, they should be afforded that right as well.³¹⁶

B. *Substantive Due Process Rights*

Excessive use of corporal punishment, “‘at least where not administered in conformity with a valid school policy authorizing corporal punishment . . . may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior.’”³¹⁷ “Many corporal punishment cases involve . . . traditional applications of physical force, [like when] school officials, subject to an official policy, or in

307. See Mulay, *supra* note 47, at 341.

308. See *id.*

309. See *id.* at 341, 348.

310. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., *supra* note 126, at 24; Mulay, *supra* note 47, at 348.

311. See Mulay, *supra* note 47, at 341, 348.

312. 546 U.S. 49 (2005).

313. *Id.* at 63–64 (Ginsburg, J., dissenting).

314. U.S. DEP’T OF EDUC., *supra* note 82, at 5; see also FLA. STAT. § 1003.573(3)(a)(6) (2014).

315. FLA. STAT. § 1003.573(1)(a).

316. See *id.* § 1003.573(3)(a)(6); U.S. DEP’T OF EDUC., *supra* note 82, at 5.

317. *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla.*, 610 F.3d 588, 598 (11th Cir. 2010) (alteration in original) (quoting *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1075 (11th Cir. 2000)).

a . . . disciplinary setting,” spank or paddle a disorderly student.³¹⁸ However, the Eleventh Circuit in *Neal ex rel. Neal v. Fulton County Board of Education*³¹⁹ stated that it does not want to open the door to a floodgate of litigation.³²⁰

The Supreme Court has been reluctant to expand substantive due process rights because of the lack of *preconstitutional history*, and the need for judicial restraint.³²¹ The Fourteenth Amendment “protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.”³²² However, cases dealing with abusive executive action have repeatedly emphasized that “only the most egregious official conduct can be said to be *arbitrary* in the constitutional sense.”³²³

In the context of disciplinary corporal punishment in the public schools, we emphasize once more that the substantive due process claim is quite different than a claim of assault and battery under state tort law. In resolving a state tort claim, [the] decision may well turn on whether “ten licks rather than five” were excessive, so that line-drawing this refined may be required. But substantive due process is concerned with violations of personal rights of privacy and bodily security of so different an order of magnitude that inquiry in a particular case simply need not start at the level of concern these distinctions imply. As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience. Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.³²⁴

318. *Neal*, 229 F.3d at 1072.

319. 229 F.3d 1069 (11th Cir. 2000).

320. *Id.* at 1076.

321. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 543–44 (1977) (White, J., dissenting)).

322. *Neal*, 229 F.3d at 1074 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (per curiam)).

323. *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla.*, 610 F.3d 588, 598 (11th Cir. 2010) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

324. *Hall ex rel. Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (citations omitted).

Under *Hall ex rel. Hall v. Tawney*,³²⁵ to have a viable substantive due process claim one must claim severe injury, the force to cause the injury must be disproportionate to the need, and the action must be inspired by malice.³²⁶ It must be brutal and inhumane abuse that shocks the conscience.³²⁷ The *Hall ex rel. Hall* standard of *shock the conscience* is followed in the Eleventh Circuit.³²⁸ The Due Process Clause is not triggered ““whenever someone cloaked with state authority causes harm,”” and it is not meant to conform state causes of action into federal causes of action.³²⁹

In determining if a student’s allegations of corporal punishment rise to the level of arbitrariness, and *shock the conscience* in violation of the Substantive Due Process Clause of the Fourteenth Amendment, the student, plaintiff, must allege: “(1) [a] school official intentionally used . . . excessive [force] under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury.”³³⁰

*T.W. ex. rel. Wilson v. School Board of Seminole County, Florida*³³¹ is a recent Eleventh Circuit case involving corporal punishment inflicted on a disabled student in school.³³² In this case, T.W. was a disabled fourteen-year-old student who had “separation anxiety disorder, major depressive disorder, dysthymic disorder, receptive expressive language disorder, and [was] eventually [diagnosed] with pervasive developmental disorder.”³³³ T.W. was able to communicate verbally, but his receptive communicative abilities were impaired.³³⁴ His teacher, Kathleen Garrett, “completed two courses on physical restraint techniques and was certified in crisis prevention intervention.”³³⁵ Garrett abused T.W. over several months.³³⁶ The first incident occurred when Garrett—who weighs over three-hundred pounds—got annoyed at T.W.’s comments for not going into the cool down room, put T.W. on the floor face first, sat on his buttocks, and put his hands behind his back.³³⁷ The second incident was when he did not follow Garrett’s command

325. 621 F.2d 607 (4th Cir. 1980).

326. *Id.* at 613.

327. *Id.*

328. *Id.*; see also *T.W.*, 610 F.3d at 602.

329. *T.W.*, 610 F.3d at 603 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998)).

330. *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1075 (11th Cir. 2000).

331. 610 F.3d 588 (11th Cir. 2010).

332. *Id.* at 592.

333. *Id.* at 593.

334. *Id.*

335. *Id.* at 595.

336. See *T.W.*, 610 F.3d at 595–96.

337. *Id.* at 595.

and started to walk away from her.³³⁸ Garrett tried to restrain T.W. while he was standing, so T.W. began swinging his hands at her, which then led Garrett to force him face down on the floor, and pull his right leg behind his left leg for two to three minutes.³³⁹ Sabrina Mort, a witness and an aide to Garrett who also observed this restraint, said “‘the strength that [Garrett] took [T.W.] down with . . . was hard,’ and ‘[t]hey both probably got hurt that day.’”³⁴⁰ “Mort testified that it was inappropriate for Garrett to pull T.W.’s leg up in that manner.”³⁴¹ “Mort [also] testified that, at least once a week, Garrett would ‘pick and nag at [T.W.] until he would just get to the point where he just [could not] take it anymore.’ Garrett often restrained her students after doing something to upset or anger them.”³⁴²

The third incident occurred when T.W. did not listen to Garrett’s instruction to stop scratching the insect bite on his arm, which was when Garrett pushed T.W.’s arms down to prevent him from scratching.³⁴³ When T.W. began screaming and cursing at Garrett, she pulled T.W. from the table—without pushing the chair out first—causing his legs to hit the table.³⁴⁴ She put his arms behind his back, forced him against the table, and leaned on his back with all of her weight to keep him in this position.³⁴⁵ When Garrett held T.W. in this position, he told her it hurt him, but Garrett would only release him once he said he would do his work.³⁴⁶ He then said he would do his work, she released him, and he went back to scratching the bite on his arm.³⁴⁷ “Garrett told T.W. to go to the cool down room, but he refused.”³⁴⁸ She then forced him into the cool down room and shut the door.³⁴⁹ “Mort heard T.W. scream[ing] ‘leave me alone,’ ‘stop it,’ and ‘[you are] hurting me,’” while furniture was being moved inside the cool down room.³⁵⁰ Garrett came out, and minutes later, T.W. came out screaming at Garrett that he would tell his mother what she did to him.³⁵¹ “The next day, T.W.’s mother [wrote] a note to [the] school asking why

338. *Id.*

339. *Id.*

340. *Id.* (alterations in original).

341. *T.W.*, 610 F.3d at 595.

342. *Id.* at 594 (alterations in original).

343. *Id.* at 595.

344. *Id.*

345. *Id.*

346. *T.W.*, 610 F.3d at 595.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *T.W.*, 610 F.3d at 595–96.

Garrett had twisted T.W.'s arm and shoved him against the wall in the cool down room.³⁵²

In the fourth incident, another aide, Jennifer Rodriguez, observed T.W. standing when Garrett pulled his hands behind his back and escorted him to the cool down room.³⁵³ Rodriguez testified that it is not appropriate to put a student's arms behind his or her back because it can cause asphyxiation.³⁵⁴

The fifth time, which Mort testified to in court, was when Garrett put T.W. in the cool down room, shut off the lights, and then blocked the exit by sitting in front of it for more than five minutes.³⁵⁵ When T.W. was allowed out of the cool down room, he started mumbling, and Garrett put her foot out to purposefully trip him.³⁵⁶

On two separate occasions, T.W.'s mother observed bruises on his arms and he told her that Garrett had hurt him.³⁵⁷ Dr. Upchurch, a psychologist, "explained that '[t]he systemized application of harsh words and actions towards the students in the class and towards [T.W.] himself created an environment of danger and fear . . . , which resulted in his exhibiting symptoms of Post-Traumatic Stress Disorder.'"³⁵⁸ Dr. Upchurch also explained that, "[b]ecause T.W. was 'one of the higher functioning students in the class, . . . [h]is inability to protect the [other students] created a sense of guilt and powerlessness.'"³⁵⁹ Dr. Upchurch concluded that T.W.'s aggravated stress and his feeling of not being safe at school caused him to drop out.³⁶⁰ Dr. Danziger, another psychiatrist retained by T.W., said Garrett probably "'suffered from both sexual masochism and sexual sadism' [because] Garrett's verbal and physical abuse of her students was 'consistent with someone whose private sadistic sexual practices spilled over into the classroom setting.'"³⁶¹

It is important to note that the police arrested Garrett for child abuse based on the four students' allegations and the jury found her guilty on one count, but the court withheld adjudication.³⁶²

T.W. claims that Garrett verbally and physically abused the disabled students "and engaged in sadistic sexual behavior [that] supports an

352. *Id.* at 596.

353. *Id.*

354. *Id.*

355. *Id.*

356. *T.W.*, 610 F.3d at 596.

357. *Id.*

358. *Id.* (alterations in original).

359. *Id.* (alterations in original).

360. *Id.*

361. *T.W.*, 610 F.3d at 597.

362. *Id.*

inference that Garrett restrained T.W. out of malice and sadism, not for the purpose of discipline.”³⁶³ The court stated that the key inquiry is not the manner of the use of force, but if the use of force is directly related to the student’s misconduct and whether it is used for disciplinary purposes.³⁶⁴ The court found that, out of the five incidents that were testified to, only one incident was not for the use of disciplinary purposes.³⁶⁵ The first incident was related to discipline because Garrett said she would release him when he followed her instructions, and she did.³⁶⁶ The second incident was related to discipline because she told him that she would release him once he calmed down, and she did.³⁶⁷ The third incident was related to discipline because she said she would release him when he agreed to do his work, and she did.³⁶⁸ The fourth incident was related to discipline because Garrett only restrained T.W. on the way to the cool down room.³⁶⁹ The fifth incident, however—when Garrett tripped T.W. on his way out of the cool down room—was not related to disciplinary purposes.³⁷⁰ The court held that it does not have to determine if Garrett’s use of force was elevated to a *shock the conscience* level in the fifth incident because tripping a student, which causes the student to stumble—without anything more—does not violate the Constitution.³⁷¹

The court then looked towards the other four incidents to see if T.W.’s rights were violated because he was not free from excessive corporal punishment.³⁷² The first step is to have the plaintiff prove that the school’s use of corporal punishment was excessive.³⁷³ To establish if the amount of force was excessive, the court looks at the totality of the circumstances, which encompasses three steps: (1) the need for using corporal punishment; (2) the relationship between the need of corporal punishment and the amount of punishment used; and (3) the degree of the inflicted injury.³⁷⁴ The court held that the first four incidents resulted from attempts to “restore order, maintain discipline, or protect T.W. from self-injurious behavior.”³⁷⁵ These incidents of restraint were due to T.W. not following Garrett’s instructions,

363. *Id.* at 598.

364. *Id.* at 598–99.

365. *Id.* at 599.

366. *T.W.*, 610 F.3d at 599.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *T.W.*, 610 F.3d at 599.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* at 600.

refusing to go to the cool down room, refusing to stop scratching an insect bite, and what led to the fourth incident is unclear, but it occurred on the way to the cool down room.³⁷⁶ T.W.'s argument was that the need for Garrett's use of force was non-existent because Garrett was the one who provoked him to act out.³⁷⁷ The court noted that there was evidence that Garrett teased T.W. until he became angry, but there was no evidence to assert Garrett provoked him.³⁷⁸

T.W. also claimed that Garrett's actions were purposely inflicted at him and other students, and that Garrett engaged in sadistic sexual behavior.³⁷⁹ The court stated that "[i]f the use of force was objectively reasonable—that is, if it “was not excessive as a matter of law and was a reasonable response to the student's misconduct”—then the subjective intent of the school official is unimportant.”³⁸⁰ The court reasoned that by viewing the four incidents objectively, even if force was used too soon, Garrett's use of force was not *wholly unjustified*.³⁸¹

The next step is to consider if the need of force was proportionate to the force exerted.³⁸² The court found that Garrett's use of force was not necessary and was inappropriate, but also that Garrett's “amount of force . . . was [not] unrelated” to the need to . . . use force.”³⁸³ This was because Garrett only restrained or secluded him for a few minutes at a time, and even though the force might have been inappropriate, it was directly related to furthering the government's goal of furthering education.³⁸⁴ All of Garrett's restraining and seclusions were so T.W. could calm down, stop being disruptive, and do his work.³⁸⁵

The third factor looks at the extent and nature of T.W.'s injuries.³⁸⁶ The court found that T.W. only suffered minor injuries—a few bruises that his mother saw.³⁸⁷ The court found Garrett's conduct did exacerbate T.W.'s developmental disability, behavioral problems, and caused him to have post-traumatic stress disorder.³⁸⁸ The court has never considered if substantive

376. *T.W.*, 610 F.3d at 600.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.* (quoting *Peterson v. Baker*, 504 F.3d 1331, 1337 n.5 (11th Cir. 2007) (per curiam)).

381. *T.W.*, 610 F.3d at 600.

382. *Id.* at 601.

383. *Id.* (alteration in original).

384. *See id.*

385. *Id.*

386. *T.W.*, 610 F.3d at 601.

387. *Id.*

388. *Id.*

due process can be violated by psychological injuries.³⁸⁹ The court looked at the totality of the circumstances, including T.W.'s psychological problems, and found that Garrett's behavior was not arbitrary, egregious, or a shock to the conscience.³⁹⁰ The court said it did "not condone the use of [excessive] force [on] a vulnerable student . . . but no reasonable jury could [have] conclude[d] that Garrett's use of force was obviously excessive in the constitutional sense."³⁹¹

The Supreme Court does not have a case on point of a student's substantive due process rights being violated due to excessive force of corporal punishment.³⁹² The lower courts have had to develop a test to approach corporal punishment, and the Seventh and Ninth Circuits use the Fourth Amendment approach, while the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits use the substantive due process tests.³⁹³ When parents and disabled students finally get to the court system, they have to satisfy the factors of the *Hall ex rel. Hall* test, they have to have evidence because they have a high burden of proof; additionally, the disabled children can have communication problems, and these behavioral problems, can limit the student's credibility.³⁹⁴ Looking at all of the factors, the court is not set up for justice, and even if by some chance the parents and disabled student win in court, the disabled student was still abused and that is something the court cannot undo.³⁹⁵ The test that the Eleventh Circuit applies—the *shock the conscience standard*—is too high of a burden for parents and disabled students to meet.³⁹⁶ In T.W.'s case, the same techniques that Garrett used on him killed another student, and that still did not violate substantive due process rights.³⁹⁷ After what Garrett did to T.W., the Florida Administrative Code rules—which have been in effect since August 7, 2008—prohibited

389. *Id.*

390. *Id.* at 602.

391. *T.W.*, 610 F.3d at 602.

392. Lewis M. Wasserman, *Corporal Punishment in K-12 Public School Settings: Reconsideration of Its Constitutional Dimensions Thirty Years After Ingraham v. Wright*, 26 TOURO L. REV. 1029, 1098 & n.486 (2011); *see also* Neal *ex rel.* Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1074 (11th Cir. 2000); *Hall ex rel. Hall v. Tawney*, 621 F.2d 607, 610–11 (4th Cir. 1980) (discussing substantive due process elements). *Compare* Wallace v. Batavia Sch. Dist., 101, 68 F.3d 1010, 1012 (7th Cir. 1995) (discussing a Fourth Amendment violation instead of a due process violation), *with* Johnson *ex rel. T.J. v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251–52 (2d Cir. 2001).

393. Wasserman, *supra* note 392, at 1098–99.

394. Mulay, *supra* note 47, at 347–48; *see also* Hall, 621 F.2d at 613.

395. Mulay, *supra* note 47, at 348.

396. *See id.*

397. *See T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla.* 610 F.3d 588, 595 (11th Cir. 2010); *M.S. ex rel. Soltys v. Seminole Cnty. Sch. Bd.*, 636 F. Supp. 2d 1317, 1325 (M.D. Fla. 2009); Mulay, *supra* note 47, at 350 n.141.

“[r]estraint of an individual’s hands, with or without a mechanical device, behind his or her back,” “[m]ovement, hyperextension, or twisting of body parts,” and “[a]ny reactive strategy that may exacerbate a known medical or physical condition, or endanger the individual’s life.”³⁹⁸ If T.W.’s case went to the Eleventh Circuit today with these new procedures now in effect, the Eleventh Circuit might hold that Garrett did violate T.W.’s substantive due process rights by using excessive corporal punishment, and restricting his freedom of movement by restraining him.³⁹⁹

In another case, *M.S. ex rel. Soltys v. Seminole County School Board*⁴⁰⁰—involving the same teacher as in *T.W.*—the Middle District of Florida generated a different outcome.⁴⁰¹ *M.S. ex rel. Soltys* concerns a disabled student who is mentally retarded, severely autistic, nonverbal, and only say about ten to twenty words.⁴⁰² M.S. is alleging that “Garrett subjected M.S. to . . . physical, emotional, and verbal abuse” and that M.S. observed other acts similar to what he experienced to fellow classmates.⁴⁰³ The way Garrett treated M.S. was what led to Garrett’s arrest in 2004 when Mort and Rodriguez told the assistant principal about the way Garrett treated some of the disabled students.⁴⁰⁴ The incident occurred when Garrett was unhappy that M.S. was looking at a magazine instead of doing his work.⁴⁰⁵ M.S. refused to do his work, and pinched Garrett, which was normal when he did not get his way.⁴⁰⁶ When this occurred, Garrett

“jerked him out of his desk so fast and flipped [his] body down on the desk, had the one arm behind him, took the other arm and put it behind him, started to lean down and with her left hand she held his head down.” Garrett then pushed M.S.’s head down across the desk while holding his hands behind his back until “his eyes were bulging” and “his lips started turning . . . a purply light blue.”⁴⁰⁷

398. FLA. ADMIN. CODE ANN. r. 65G-8.009(4), (6), (9) (2014); *see also T.W.*, 610 F.3d at 595.

399. *See T.W.*, 610 F.3d at 602 (inferring that from these now effective rules—Florida Administrative Code rules 65G-8.009(4), (6), and (9)—the Eleventh Circuit might have held differently because Garrett’s use of force was not in line with her duties as a teacher, and it went beyond her duties to restrain him the way she did multiple times as well with the other students).

400. 636 F. Supp. 2d 1317 (M.D. Fla. 2009).

401. *Compare id.* at 1326, *with T.W.*, 610 F.3d at 602.

402. *M.S.*, 636 F. Supp. 2d at 1319.

403. *Id.*

404. *Id.* at 1320.

405. *Id.* at 1319.

406. *Id.*

407. *M.S.*, 636 F. Supp. 2d at 1319–20 (alterations in original) (citation omitted).

Mort, a school aide, told Garrett to release M.S. because he had enough and Garrett finally released him.⁴⁰⁸ Upon releasing him, Garrett physically assaulted Mort by pushing him against the door and telling him “[t]his is my fucking class and [I will] run it the way I see fit.”⁴⁰⁹

Other acts that Mort and Rodriguez testified to involved Garrett’s behavior toward M.S.⁴¹⁰ In Mort’s deposition, she recounted several incidents of Garrett abusing M.S.⁴¹¹ “One incident [was] when Mort took M.S. to [use] the restroom to change his clothes because he . . . wet his pants [which was] common . . . due to his developmental disabilities and his lack of toilet training.”⁴¹² Garrett followed M.S. and Mort, and when they reached the restroom door she shut it and told M.S. “[y]ou will not piss [your pants] in my class,” and after every word she continuously struck M.S. “in the back of the head with the [bottom] of her palm.”⁴¹³ Mort said Garrett hit M.S. hard, and the last strike was “so hard that his chin hit his knee.”⁴¹⁴ In another instance like the one just mentioned, M.S. had to change his pants in the restroom again, and Garrett “smacked him on the butt” which was firm enough to leave three fingerprint marks, which Mort saw when she changed his clothes.⁴¹⁵ Another incident that Mort relayed was that Garrett frequently hit M.S. with her fist and elbow for a wide variety of reasons like making him be quiet, to make him continue his school work, to stop M.S. from trying to kiss her, and to stop him from laying down to go to sleep.⁴¹⁶ At times, these blows from Garrett were firm enough to make M.S.’s whole head jerk.⁴¹⁷ Rodriguez gave the same accounts as Mort did and some other instances where Garrett abused M.S.⁴¹⁸ M.S.’s parents said that before enrolling him in this school, he was not an aggressive child; he played with the neighbors and his parents, and even traveled to Europe with his parents.⁴¹⁹ But after being at this school with Garrett abusing M.S., he is now more aggressive towards his siblings and even strangers.⁴²⁰ His parents remember one incident when they drove him to school and M.S. had a panic

408. *Id.* at 1320.

409. *Id.*

410. *Id.*

411. *Id.*

412. *M.S.*, 636 F. Supp. 2d at 1320.

413. *Id.* (alteration in original).

414. *Id.*

415. *Id.*

416. *Id.*

417. *M.S.*, 636 F. Supp. 2d at 1320 (alterations in original).

418. *Id.*

419. *Id.* at 1321.

420. *Id.*

attack; he started to cry and scream “no school” repeatedly while trying to get back into his parents car.⁴²¹

M.S. and his parents allege that his Fourteenth Amendment substantive due process rights were violated due to being mentally and physically abused by his teacher Garrett.⁴²² “Embodied in the [Fourteenth Amendment] right is the right to be free from excessive force at the hands of a government official.”⁴²³ To establish if a governmental actor is liable under 42 U.S.C. § 1983⁴²⁴ the court must look to the following four factors: (1) the need for using corporal punishment, (2) the relationship between the need for corporal punishment and the amount of punishment used, and (3) the degree of the inflicted injury, and (4) “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”⁴²⁵ The *shock the conscience* threshold is quickly reached when the victim is more vulnerable to abuse and is defenseless.⁴²⁶

First, the court considered the need to use corporal punishment by looking to M.S.’s normal conduct, which is pinching to get attention and an inability to control bodily functions, versus Garret smashing M.S.’s head into the desk and leaning on him, all three hundred pounds worth of Garrett, “until his eyes bulged out [of his head] and his face turned blue.”⁴²⁷ The court found that a jury could determine that there was no need for Garrett to use corporal punishment for M.S.’s normal actions and for actions he could not control like wetting his pants.⁴²⁸ The court then considered the relationship between the need of corporal punishment and the amount of

421. *Id.*

422. *M.S.*, 636 F. Supp. 2d at 1323.

423. *Id.*

424. 42 U.S.C. § 1983 (2012). Title 42, Section 1983 of the United States

Code states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

425. *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

426. *M.S.*, 636 F. Supp. 2d at 1323.

427. *Id.* at 1324; *see also* *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla.*, 610 F.3d 588, 595 (11th Cir. 2010).

428. *M.S.*, 636 F. Supp. 2d at 1324.

punishment used, finding that a jury could determine that Garrett's use of corporal punishment and physical force was disproportionate to the disciplinary actions needed.⁴²⁹

Next in the court's analysis, was the extent of M.S.'s injury.⁴³⁰ Garrett's sole argument was that M.S.'s injury did not meet the *shock the conscience* threshold, and that there were no physical injuries.⁴³¹ The court rejected Garrett's argument because a reasonable jury could have found—if it accepted the plaintiff's evidence—that M.S.'s injuries were physical, mental, and emotional.⁴³² “[E]ven though [M.S.’s] alleged injuries [were] more difficult to quantify than . . . the average [corporal punishment] case, that [did] not mean they [were] nonexistent.”⁴³³ M.S.'s mother noticed he had bruising on multiple occasions but that it was due to his own self-infliction.⁴³⁴ M.S.'s parents said they noticed behavioral changes in M.S. after he was put in the school where Garrett was his teacher.⁴³⁵ M.S. was also in the classroom with ten other students who were all autistic, and observed Garrett abuse other disabled students verbally and physically.⁴³⁶ The court noted that this could have created an aggressive and abusive environment.⁴³⁷ A violation of the Fourteenth Amendment is determined on a case-by-case basis.⁴³⁸ The degree of injury must be weighed with the need to exert excessive physical force and the plaintiff's vulnerability.⁴³⁹ There are circumstances that call for extreme, immediate measures to ensure the

429. *Id.* at 1323–24.

430. *Id.* at 1324.

431. *Id.*

432. *Id.*

433. *M.S.*, 636 F. Supp. 2d at 1324.

434. *Id.*

435. *Id.*

436. *Id.* at 1324 n.6. The court noted that Garrett wanted it to disregard other allegations of child abuse besides M.S. *Id.* The court concluded that it could not do that because M.S. could have been affected by watching his classmates be abused by Garrett. *M.S.*, 636 F. Supp. 2d at 1324 n.6.

In a classroom of fewer than ten students, all of whom were autistic, the regular use of unnecessary violence and the consistent barrage of verbal assaults could have created a harmful and perhaps emotionally abusive environment. When that environment is coupled with evidence of direct physical assault such as alleged here, the question of whether a constitutional violation occurred is one for a jury. Garrett's direct abuse of one child was a different kind of abuse for another. An absurd result might follow, particularly in this setting, if Garrett's actions were considered in a vacuum and Garrett benefitted from the fact that she mistreated all of the children rather than confining her abuse to a single child.

Id.

437. *Id.* at 1324 n.6.

438. *See id.* at 1325.

439. *Id.*

safety of other students and those around them.⁴⁴⁰ Nonetheless, “school . . . restraints used as aversive techniques to control behavior or impose negative consequences should never be used on children.”⁴⁴¹ Garrett physically abused M.S. by slapping him on his buttocks so hard she left fingerprint marks, slapping his head so that his head shook and hit his chin, and slamming him into the desk so that he could not breathe—his face turning blue and his eyes bulging out.⁴⁴² Here, a jury could have determined that Garrett maliciously used unnecessary and excessive physical force against a helpless autistic child.⁴⁴³

Finally, the court considered “whether the force was [used] in good faith” to maintain order and restore discipline to the room, or was *inspired by malice*.⁴⁴⁴ The court found that Garrett could have needed to use some type of physical restraint to maintain order in the room and restore discipline when M.S. pinched her; however, the court found that the excessive force Garrett used by slamming M.S. into the desk, leaning on him so he could not breathe, and causing his eyes to bulge out of his head, was not needed to restore order to the room.⁴⁴⁵ M.S. suffered severe physical and emotional damages due to multiple abusive incidents.⁴⁴⁶ If Garrett only had this one abusive incident with M.S. she might have escaped constitutional liability under *Hall ex rel. Hall*.⁴⁴⁷ Nevertheless, this was evidence that there was not only one incident of abuse, but multiple incidents, making a pattern of abuse.⁴⁴⁸ If these incidents came out at trial, a jury could have found that Garrett’s actions were not made in good faith to restore order to the classroom, and that she had malicious intent.⁴⁴⁹

If at trial M.S. was found to have suffered a violation of his Fourteenth Amendment rights, Garrett would not be subject to qualified immunity because she used excessive punishment on an autistic, helpless child who could not communicate, which is prohibited by the Fourteenth Amendment.⁴⁵⁰ M.S. has “the right to be free from excessive and arbitrary

440. Craig Goodmark, *A Tragic Void: Georgia’s Failure to Regulate Restraint & Seclusion in Schools*, 3 J. MARSHALL L.J. 249, 256 (2010).

441. *Id.*

442. *M.S.*, 636 F. Supp. 2d at 1325.

443. *Id.* at 1324.

444. *Id.* at 1325.

445. *Id.*

446. *Id.*

447. *M.S.*, 636 F. Supp. 2d at 1325; *see also* *Hall ex rel. Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

448. *M.S.*, 636 F. Supp. 2d at 1325.

449. *Id.*

450. *Id.*; *see also* U.S. CONST. amend. XIV, § 1.

corporal punishment,” especially in a school milieu.⁴⁵¹ This was established under the precedent from the Supreme Court of the United States in *Ingraham* and from the Eleventh Circuit in *Neal ex rel. Neal*.⁴⁵² The court denied Garrett’s motion for summary judgment because a jury could have concluded that Garrett’s use of corporal punishment was excessive, and it violated M.S.’s Fourteenth Amendment right to freedom of movement and to be free from corporal punishment.⁴⁵³

C. *The Rowley Court Set the Legal Test to Determine if a Child Has a FAPE in School*

The Supreme Court of the United States has consistently held that a FAPE is comprised of:

[E]ducational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child *to benefit* from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the [s]tate’s educational standards, approximate the grade levels used in the [s]tate’s regular education, and comport with the child’s IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a *free, appropriate public education* as defined by the Act.⁴⁵⁴

Its holding gave special education providers a loophole to not educate to the fullest extent possible because under the law, if they abide by the student’s IEP, give them any special education instruction, and an aide—plus anything else that the statute requires—the child is receiving a FAPE.⁴⁵⁵ Although it is a FAPE, nevertheless, it is not the best free public education.⁴⁵⁶ The disabled child’s parents’ argument is that the goal of the

451. *M.S.*, 636 F. Supp. 2d at 1325.

452. *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000); *see also* *Ingraham v. Wright*, 430 U.S. 651, 678 (1977).

453. *M.S.*, 636 F. Supp. 2d at 1325–26; *see also* U.S. CONST. amend. XIX, § 1.

454. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188–89 (1982).

455. *See id.* at 203.

456. *See id.* at 189.

EHA—what is now amended as IDEA⁴⁵⁷—is to provide FAPE to disabled children who qualify, but it fails to provide an equal opportunity for education.⁴⁵⁸ *Mills* and *Pennsylvania Ass'n for Retarded Children* both held that handicapped children are required to receive access to “adequate, publicly supported education,” not that handicapped children require “any particular substantive level of education.”⁴⁵⁹ The Supreme Court of the United States noted in a footnote that every need of disabled children cannot be met, which is why the special education teachers and the parents make an IEP, to see what services the student will receive.⁴⁶⁰ “If sufficient funds are not available to finance all of the services and programs that are needed . . . then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.”⁴⁶¹ The Supreme Court of the United States stated that insufficient funding or even administrative inefficiency of a school could not burden the exceptional disabled student more than a *normal child*.⁴⁶² This case purports that there is no equality in education for disabled—or *exceptional students*, as called by IDEA—and normal children.⁴⁶³ IDEA provisions provide that disabled children should be in the least restrictive environment, which is being in a regular class with other nondisabled students, along with an aide, if possible.⁴⁶⁴ This means that a disabled child would be learning at the same rate of a nondisabled child in school.⁴⁶⁵

In *Board of Education of the Hendrick Hudson Center School District v. Rowley*⁴⁶⁶, the school would not provide a deaf child with a qualified sign language interpreter in her classes.⁴⁶⁷ The parents and the

457. DISABILITY RIGHTS SECTION, *supra* note 80, at 15; *see also* 20 U.S.C. § 1400 (2012).

458. *Rowley*, 458 U.S. at 198; *see also* Education for All Handicapped Children Act of 1975, Pub. L. No 94-142, § 1401, 89 Stat. 773 (amended 1990).

459. *Rowley*, 458 U.S. at 193 (citing *Pa. Ass'n. for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971) (per curiam) and *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 878 (D. D.C. 1972)). The Supreme Court of the United States agreed with both cases on how much education disabled children receive versus how much education the disabled children need. *See id.* at 193 n.15.

460. *Id.* at 193 n. 15, 194 n.16.

461. *Id.* at 199 (quoting *Mills*, 348 F. Supp. at 876).

462. *See id.* at 193 n.15; *Mills*, 348 F. Supp. at 876.

463. *See Rowley*, 458 U.S. at 198.

464. 20 U.S.C. § 1412(a)(5)(A) (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 3.

465. 20 U.S.C. § 1412(a)(5)(A); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 3.

466. 458 U.S. 176 (1982).

467. *Id.* at 184–85.

student sued the School District of New York under EHA of 1975—amended now as 20 U.S.C. § 1401—because the school district denied her a FAPE.⁴⁶⁸ The school district denied the student’s request because she was excelling in all her classes and understanding the material without the help of a sign language interpreter.⁴⁶⁹ The court applied a two-part test to determine if a disabled child had a FAPE: (1) whether the state has complied with the procedures required by EHA or IDEA; and (2) was the IEP reasonably calculated to have the disabled student obtain educational value?⁴⁷⁰

The *Rowley* standard has been prominent in EHA cases—the predecessor to IDEA cases—for over twenty-five years, and Congress has still not expressed disagreement with it.⁴⁷¹ If Congress did explicitly disagree with the *Rowley* standard, it could change the FAPE definition.⁴⁷² Yet Congress still has not amended the statutory FAPE definition, which “weighs strongly against finding a congressional intent to alter the *Rowley* standard,” of FAPE.⁴⁷³

Cases are brought under the *Rowley* standard by the parents and disabled children arguing that being restrained and secluded is a denial of their FAPE.⁴⁷⁴ Their argument is supported by a report which states that the restraining or secluding of a disabled child takes away from their goals in the IEP.⁴⁷⁵ It also distracts them from their education since they will not be educated during the time they are restrained or secluded.⁴⁷⁶ It can also make them anxious, and even develop more behavioral issues in the future.⁴⁷⁷

468. 20 U.S.C. § 1401; *Rowley*, 458 U.S. at 185.

469. *Rowley*, 458 U.S. at 185.

470. *Id.* at 206–07.

471. Alyssa Kaplan, Note, *Harm Without Recourse: The Need for a Private Right of Action in Federal Restraint and Seclusion Legislation*, 32 CARDOZO L. REV. 581, 590–91 n.60 (2010); see also *Rowley*, 458 U.S. at 206–07.

472. Kaplan, *supra* note 471, at 590 n.60; see also *Rowley*, 458 U.S. at 206–07.

473. Kaplan, *supra* note 471, at 590 n.60 (quoting Mr. C. *ex rel.* K.C. v. Me. Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 301 (D. Me. 2008)); see also *Rowley*, 458 U.S. at 206–07.

474. *Rowley*, 458 U.S. at 189; Kaplan, *supra* note 471, at 589–90.

475. See NAT’L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: UPDATE ON PROGRESS IN 2009 TO PREVENT AND REDUCE RESTRAINT AND SECLUSION IN SCHOOLS 27 (2010), available at <http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School-is-Not-Supposed-to-Hurt-NDRN.pdf>.

476. See *id.*

477. See JESSICA BUTLER, COUNCIL OF PARENT ATTORNEYS & ADVOCATES, UNSAFE IN THE SCHOOLHOUSE: ABUSE OF CHILDREN WITH DISABILITIES 1, 20, 25–26, 44 (2009), available at http://c.ymcdn.com/sites/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf.

D. *Disabled Children and Their Parents Suing Schools Under the Federal Statute IDEA Does Not Provide the Protection Most Disabled Students Sought for in the Federal Court System*

IDEA is what most litigants sue under when trying to protect the rights of their disabled children.⁴⁷⁸ In the IDEA provisions, a school is supposed to provide FAPE to disabled students.⁴⁷⁹ This is because IDEA is a federal program that gives money to state and local agencies that comply with the conditions in IDEA to aid disabled students in receiving a better education.⁴⁸⁰ FAPE is supposed to tailor education services and provide aides to disabled students, which help them learn better in a least restrictive environment.⁴⁸¹ With all of these provisions in IDEA to help disabled children receive a better and free education, it would seem logical that this statute would aid disabled students in vindicating their rights that have been infringed.⁴⁸² However, most parents of disabled children who were restrained or secluded in school cannot immediately sue the school or anyone involved.⁴⁸³ This is because through IDEA, one of the provisions is that all administrative remedies have to be exhausted before a parent can file a suit in court on their child's behalf.⁴⁸⁴

VI. RECOMMENDATIONS

There should be a federal and state mandate from the Supreme Court of the United States, U.S. Congress, and the Florida Legislature, that expressly prohibits all restraint and seclusion techniques, except in emergency circumstances where the disabled student is a threat to himself or to others around him.⁴⁸⁵ The federal and state statutes should ban all:

1. Reactive strategies involving noxious or painful stimuli, as prohibited by section 393.13(4)(g) [of the Florida Statutes];
2. Untested or experimental procedures;

478. Mulay, *supra* note 47, at 340; *see also* 20 U.S.C. § 1400 (2012).

479. 20 U.S.C. § 1400(c)(3); Greer v. Rome City Sch. Dist., 950 F.2d 688, 694–95 (11th Cir. 1991).

480. Greer, 950 F.2d at 694; *see also* 20 U.S.C. § 1400.

481. 20 U.S.C. § 1412(a)(10)(i), (a)(5)(A); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 3.

482. *See* Mulay, *supra* note 47, at 340.

483. *Id.* at 341.

484. *See* 20 U.S.C. § 1415 (b)(1)–(8), (g)(1); Mulay, *supra* note 47, at 341.

485. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 65G-8.006(6)–(7) (2014); U.S. DEP'T OF EDUC., *supra* note 82, at 2.

3. Any physical crisis management technique that might restrict or obstruct an individual's airway or impair breathing, including techniques whereby staff persons use their hands or body to place pressure on the client's head, neck, back, chest, abdomen, or joints;
4. Restraint of an individual's hands, with or without a mechanical device, behind his or her back;
5. Physical holds relying on the inducement of pain for behavioral control;
6. Movement, hyperextension, or twisting of body parts;
7. Any maneuver that causes a loss of balance without physical support—such as tripping or pushing—for the purpose of containment;
8. Any reactive strategy in which a pillow, blanket, or other item is used to cover the individual's face as part of the restraint process;
9. Any reactive strategy that may exacerbate a known medical or physical condition, or endanger the individual's life;
10. Use of any containment technique medically contraindicated for an individual;
11. Containment without continuous monitoring and documentation of vital signs and status with respect to release criteria.⁴⁸⁶

Furthermore, all disabled students and special education teachers should start using a positive reinforcement system instead of a negative reinforcement system—like secluding or restraining children.⁴⁸⁷ All special education teachers should be required to get certified and recertified every five years, and do continuing education to learn more about working with disabled children properly and effectively.⁴⁸⁸ The statutes should also restate that all disabled students should be entitled to due process of law, and have a

486. See, e.g., FLA. ADMIN. CODE. ANN. r. 65G-8.009(1)–(11).

487. See, e.g., JIM WRIGHT, INTERVENTION CENT., HOW TO: IMPROVE CLASSROOM BEHAVIORS USING SELF-MONITORING CHECKLISTS 1–2 (2014), available at http://www.interventioncentral.org/sites/default/files/pdfs/pdfs_blog/self_management_self_monitoring_behavior_checklist.pdf.

488. See FLA. ADMIN. CODE. ANN. r. 65G-8.005(3).

right to be free from bodily restraint and corporal punishment from a governmental actor.⁴⁸⁹

The solution should be modeled after the U.S. Department of Education's solution, which states that no student should be restrained or secluded unless the student is in imminent danger to cause physical harm to himself or others.⁴⁹⁰ The U.S. Department of Education also proposes that when a student has a history of dangerous and escalating behavior, and teachers have previously restrained or secluded the child to restore order, "a school [ought to make] a plan for (1) teaching and supporting more appropriate behavior; and (2) determining positive methods to prevent behavioral escalations that have previously resulted in the use of restraint or seclusion."⁴⁹¹

To aid with this new positive behavior technique, the federal statute and the Florida statute should also include a monitoring checklist, so students can monitor their own progress.⁴⁹² There are two checklists that students can fill out with their teachers.⁴⁹³ The school can obtain sample checklists online.⁴⁹⁴ It has been proven that students who have their own checklists that target positive behavioral conduct and replacement behaviors—which replace problem behaviors known to trigger restraint and seclusion—show improvement in their general classroom conduct.⁴⁹⁵ The teacher can customize each checklist for each disabled student with what each student needs to work on throughout the day.⁴⁹⁶ The teacher can then conduct a monitoring session for certain students, and as the school day progresses, the student can check off what he thought he did correctly and what improvements are needed.⁴⁹⁷ Then, this can be compared to the teacher's self-assessment through the student's conduct, and the student can better equate what is expected of him throughout the day.⁴⁹⁸

Researchers have also found that "[s]tudents are more likely to achieve [success] when they are (1) directly taught school and classroom routines and social expectations that are predictable and contextually relevant; (2) acknowledged clearly and consistently for their displays of positive academic and social behavior; and (3) treated by others with

489. See U.S. CONST. amend. XIV, § 1; FLA. STAT. § 393.13(g) (2014).

490. U.S. DEP'T OF EDUC., *supra* note 82, at 16–17.

491. *Id.* at 17.

492. See Wright, *supra* note 487, at 1.

493. *Id.* at 3–5.

494. *E.g., id.* at 2.

495. See *id.* at 1–2.

496. *Id.* at 1.

497. Wright, *supra* note 487, at 1, 3–5.

498. See *id.* at 1.

respect.”⁴⁹⁹ To do this the entire school needs to be invested in having a positive behavioral support system, not just the students with behavioral problems.⁵⁰⁰ The school should: Focus on preventing the problem behavior by finding the underlying root to the behavioral problem and “review[] behavioral data regularly” that they are required to report, so they can adopt “procedures to the needs of all students and provid[e] additional academic and social behavioral supports for students who are not making expected progress.”⁵⁰¹ There is no evidence that shows that school officials, teachers, or aides who use restraining and secluding methods actually positively benefit the child.⁵⁰² There is also no evidence that shows that using restraining and secluding methods reduce the occurrence of behavioral outbursts.⁵⁰³ These behavioral outbursts are normally what cause others to use these abusive methods on the disabled students in the first place.⁵⁰⁴ A ban should be in place for all types of restraint and seclusion, and be replaced with positive behavioral reinforcement techniques.⁵⁰⁵

VII. CONCLUSION

Students with disabilities should not be abused when they go to school by being restrained and secluded.⁵⁰⁶ Disabled students being restrained and secluded in school violates their Fourteenth Amendment procedural and substantive due process rights.⁵⁰⁷ When this occurs, school personnel violate the students’ procedural due process rights because the disabled students’ interests fall within the scope of the Fourteenth Amendment’s life, liberty, or property interests; due process is the addition of procedural safeguards which cost the school little to nothing.⁵⁰⁸ These procedural safeguards should be: (1) notifying the parents of restraining or secluding students before it occurs so they can sign a consent form; (2) allowing the parents and student to have a due process hearing before an incident occurs; and (3) after the incident occurs, letting the parents know why it happened.⁵⁰⁹ Then, the parents and student can be afforded a due

499. U.S. DEP’T OF EDUC., *supra* note 82, at 2–3.

500. *Id.* at 3.

501. *Id.*

502. *Id.* at 2.

503. *Id.*

504. See U.S. DEP’T OF EDUC., *supra* note 82, at 15–16, 18–19.

505. *Id.* at 8, 12, 15, 18; see also Wright, *supra* note 487, at 1.

506. FLA. STAT. § 393.13(3)(g) (2014).

507. See U.S. CONST. amend. XIV, § 1.

508. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977); see also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

509. See OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 81, at 1.

process hearing to make sure the restraint or seclusion was necessary after the incident.⁵¹⁰ These procedural safeguards are required by the reauthorization of IDEA in 2004, which requires the U. S. Department of Education to create model forms for an IEP, prior written notice, and procedural safeguards for restraint and seclusion of disabled students.⁵¹¹

Furthermore, disabled students' substantive due process rights are violated when: (1) there is a severe injury; (2) the force to cause the injury was disproportionate to the need; and (3) the action was inspired by malice.⁵¹² For a court to establish if a student's allegations of corporal punishment rise to a level of arbitrariness and the *shock the conscience* standard—which would violate the student's substantive due process rights—the student or parents must allege: “(1) a school official intentionally used . . . excessive [force] under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury.”⁵¹³ It also would aid them if they were able to prove that the teacher has a pattern of abuse instead of one isolated incident.⁵¹⁴ This would prove it was done with malicious intent.⁵¹⁵ If a student proves the above test, then the court would rule that the student's substantive due process rights were violated because the teacher's actions were not made in good faith to restore order to the classroom, but were done with malicious intent.⁵¹⁶ In most cases, the teachers that abuse disabled students by restraining and secluding them are not isolated incidents.⁵¹⁷ Disabled students have suffered severe injury from these techniques used in schools.⁵¹⁸ Courts have held that excessive corporal punishment used maliciously on disabled students violates their substantive due process rights to be free from bodily restraint and punishment.⁵¹⁹

510. See FLA. STAT. § 1003.573 (1), (3), (5) (2014); FLA. ADMIN. CODE ANN. r. 65G-8.012 (2014).

511. OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 81, at 1.

512. See *Hall ex rel. Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

513. *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1075 (11th Cir. 2000); see also *T.W. ex rel. Wilson v. Sch. Bd. Of Seminole Cnty., Fla.*, 610 F.3d 588, 598 (11th Cir. 2010).

514. See *T.W.*, 610 F.3d at 602; *M.S. ex rel. Soltys v. Seminole Cnty. Sch. Bd.*, 636 F. Supp. 2d 1317, 1325 (M.D. Fla. 2009).

515. See *T.W.*, 610 F.3d at 602; *M.S.*, 636 F. Supp. 2d at 1325.

516. See *T.W.*, 610 F.3d at 602; *M.S.*, 636 F. Supp. 2d at 1325.

517. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 7.

518. *Id.* at 7, 10.

519. *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977); *T.W.*, 610 F.3d at 602; *M.S.*, 636 F. Supp. 2d at 1325.